MEMORANDA, CORRESPONDENCE, &c.

BEARING ON

THE VALIDITY OF EXISTING CANADIAN LEGISLATION

AND

THE POWER OF THE CANADIAN PARLIAMENT TO ENACT VALID LEGISLATION

RELATING TO

MERCHANT SHIPPING

DEPARTMENT OF MARINE AND FISHERIES
OTTAWA, CANADA

OTTAWA
F. A. ACLAND
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1925

26-10-43

The validity of existing Canadian legislation and the power of the Canadian Parliament to enact valid legislation relating to Merchant Shipping has for some years been engaging the attention of the Department of Marine and Fisheries.

In view of all that has been spoken and written in recent years about Canada having become a nation, it would appear that the time has arrived when this question might well receive further consideration at the hands of the Government and Parliament. The Parliament of Canada is not wholly competent to legislate with regard to Merchant Shipping. The reasons that led to the withholding of this power from Canada while conceding the power to legislate freely respecting other matters have never so far as I have been able to learn, been made clear. If any reasons existed in earlier years, they are not now apparent. Enlarged *powers* and *rights* have in the meantime been obtained for Canada through the process of asserting them. The right to legislate in the matter of Merchant Shipping cannot be obtained merely by the asserting of it. Certain provisions of the Merchant Shipping Act will have to be amended or repealed before Canada will be free in this regard. That can only be brought about by action on the part of the Imperial Government.

It is for the Government of Canada to consider whether representations should be made to His Majesty's Government suggesting that the relevant sections of the Merchant Shipping Act 1894, more particularly Sections 735 and 736, be amended to the end that they shall not be applicable to Canada.

The subjoined documents embodying the opinions of Ministers and others in England, Canada, Australia and New Zealand, have been assembled with the object of facilitating the further consideration of the question by Ministers and other interested persons.

A. JOHNSTON,
Deputy Minister of Marine and Fisheries.

OTTAWA, March 2, 1925.

NOTE

As in the following pages frequent reference is made to

(*a*) British North America Act, 1867, section 91.
(*b*) Colonial Laws Validity Act, 1865, section 2.
(*c*) Merchant Shipping Act, 1894, sections 713, 735 and 736.

these sections are set out hereunder,—

(*a*) British North America Act, 1867.

Section 91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make Laws for the Peace, Order and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say:—

. . . . . .

10. Navigation and Shipping.

. . . . . .

93602—2

(*b*) **Colonial Laws Validity Act, 1865.**

Section 2. Any Colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation, made under authority of such Act of Parliament, or having in the Colony the force or effect of such Act, order, or regulation, shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

(*c*) **Merchant Shipping Act, 1894.**

Section 713. The Board of Trade shall be the department to undertake the general superintendence of all matters relating to merchant shipping and seamen, and are authorized to carry into execution the provisions of this Act and of all Acts relating to merchant shipping and seamen for the time being in force, except where otherwise provided by those Acts, or except so far as those Acts relate to the revenue.

Section 735. (1) The Legislature of any British possession may by any Act or Ordinance, confirmed by Her Majesty in Council, repeal, wholly or in part, any provisions of this Act (other than those of the Third Part thereof which relate to emigrant ships), relating to ships registered in that possession; but any such Act or Ordinance shall not take effect until the approval of Her Majesty has been proclaimed in the possession, or until such time thereafter as may be fixed by the Act or Ordinance for the purpose.

(2) Where any Act or Ordinance of the legislature of a British possession has repealed in whole or in part as respects that possession any provision of the Acts repealed by this Act, that Act or Ordinance shall have the same effect in relation to the corresponding provisions of this Act as it had in relation to the provision repealed by this Act.

Section 736. The Legislature of a British possession, may, by any Act or Ordinance, regulate the coasting trade of that British possession, subject in every case to the following conditions:—

(*a*) the Act or Ordinance shall contain a suspending clause providing that the Act or Ordinance shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed;

(*b*) the Act or Ordinance shall treat all British ships (including the ships of any other British possession) in exactly the same manner as ships of the British possession in which it is made;

(*c*) where by treaty made before the passing of the Merchant Shipping (Colonial) Act, 1869 (that is to say, before the thirteenth day of May eighteen hundred and sixty-nine), Her Majesty has agreed to grant to any ships of any foreign State any rights or privileges in respect of the coasting trade of any British possession, those rights and privileges shall be enjoyed by those ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same, anything in the Act or ordinance to the contrary notwithstanding.

The Memoranda, Correspondence, etc., is divided into three parts,—

1. Canada, pages 5 to 16.
2. Australia, pages 17 to 29.
3. New Zealand, pages 30 to 36.

CANADA

No. 1

THE SECRETARY OF STATE TO THE GOVERNORS GENERAL OF CANADA AND AUSTRALIA AND THE GOVERNOR OF NEW ZEALAND

DOWNING STREET, April 2, 1908.

MY LORD,—(With reference to my despatch of the 29th of November, 1907 ((Cd. 3891), page 7), on the subject of the Commonwealth Navigation Bill). (With reference to my despatch of the 29th of November ((Cd. 3891), page 7), on the subject of shipping legislation in New Zealand). (With reference to the correspondence on the subject of merchant shipping legislation in Australia and New Zealand recently presented to Parliament (Cd. 3891)).

I have the honour to transmit to Your Excellency, to be laid before your ministers, copy of a letter from the Chamber of Shipping of the United Kingdom communicating a resolution, passed at the annual meeting of the Chamber, to the effect that, in the opinion of the Chamber, legislation in the British dominions affecting British ships not registered in, nor engaged in, the coastal trade of the dominions, should not impose upon such ships any restrictions beyond those imposed by the Imperial Merchant Shipping Acts.

2. His Majesty's Government concur in the views expressed by the Chamber and trust that your ministers will bear them in mind in any merchant shipping legislation which may be deemed desirable. They will, however, be glad to give full consideration to any amendments in the Imperial Acts which may be suggested from time to time by your Government.

I have, etc.,

ELGIN.

Enclosure in No. 1

CHAMBER OF SHIPPING OF THE UNITED KINGDOM TO COLONIAL OFFICE,
5 Whittington Avenue, Leadenhall Street, E.C., March 23, 1908.

AUSTRALIAN AND OTHER COLONIAL LEGISLATION

MY LORD,—I am directed by the Executive Council of this Chamber to forward to your Lordship the subjoined copy of a resolution upon the above subject which was unanimously agreed to at the recent annual meeting of this Chamber and to request for it your Lordship's favourable consideration.

I am, etc.,
W. H. COOKE,
Secretary.

RESOLUTION

"That, in the opinion of this Chamber, legislation in Australia and other colonies of the Empire affecting British ships owned in the United Kingdom not engaged in the coastal trade of the colony should not impose upon such ships any restrictions beyond those imposed upon them by the British Merchant Shipping Acts."

No. 2

THE GOVERNOR-GENERAL OF CANADA TO THE SECRETARY OF STATE

GOVERNMENT HOUSE, OTTAWA, May 30, 1908.

MY LORD,—With reference to Lord Elgin's despatch of the 2nd ultimo, communicating the text of a resolution passed by the Chamber of Shipping of the United Kingdom, to the effect that legislation in the British dominions affecting British ships not registered in, nor engaged in, the coastal trade of the dominions, should not impose upon such ships restrictions beyond those imposed by the Imperial Merchant Shipping Act, I have the honour to forward copy of an approved minute of the Privy Council, giving particulars of the only restriction to which such ships are made liable in Canada under the provisions of an Order of the Governor General in Council, dated the 11th April, 1904.

I have, &c.,

GREY.

93602—2½

Enclosures in No. 2

CERTIFIED COPY OF A REPORT OF THE COMMITTEE OF THE PRIVY COUNCIL, APPROVED BY HIS EXCELLENCY THE GOVERNOR-GENERAL ON THE 27TH MAY, 1908

(P.C. 2046 M.)

The Committee of the Privy Council have had under consideration a despatch, dated April 2, 1908, from the Right Honourable the Secretary of State for the Colonies, transmitting a copy of a letter from the Chamber of Shipping of the United Kingdom on the subject of legislation in the British dominions affecting British ships not registered in, nor engaged in, the coasting trade of the dominions.

The Minister of Marine and Fisheries, to whom the said despatch was referred, observes that His Majesty's Government concur in the views expressed by the Chamber that such legislation should not impose upon such ships any restrictions beyond those imposed by the Imperial Merchant Shipping Act.

The minister submits that with the exception of an inspection fee of eight cents per gross ton, which British ships not registered in Canada, but engaged in carrying passengers from any port in the Dominion, when not holding a British Board of Trade certificate, are subject to under the provisions of an Order in Council, dated April 11, 1904, he is unaware that any restrictions are imposed on them beyond those imposed by the Imperial Merchant Shipping Act.

The minister states as to the periodical inspection, with the application of the hydraulic test, of British non-passenger ships registered elsewhere than in Canada, although such inspection is not required in the United Kingdom, it is deemed necessary in Canada, but it is only applied to these ships when they engage in the coasting trade of the Dominion, and Lord Elgin states in his despatch that freedom of action by the Dominion in such cases is conceded by His Majesty's Government.

The committee, on the recommendation of the Minister of Marine and Fisheries, advise that Your Excellency may be pleased to cause the Right Honourable the Secretary of State for the Colonies to be advised in the sense of this report, and at the same time to transmit, for the information of His Majesty's Government, a copy of the Order in Council of April 11, 1904, in regard to the inspection of ships registered elsewhere than in Canada.

The committee submit the same for approval.

RODOLPHE BOUDREAU,
Clerk of the Privy Council.

AT THE GOVERNMENT HOUSE AT OTTAWA
The 11th day of April, 1904.

PRESENT:

THE GOVERNOR GENERAL IN COUNCIL

The Governor General in Council in virtue of the provisions of subsection 3 of section 3 of the Steamboat Inspection Act of 1898, as amended by subsection 3 of section 1 of chapter 66 of the Statutes of 1903, is pleased to order and doth order that the Order in Council of January 27, 1898, imposing, with certain exemption, the provisions of the Canadian Steamboat Inspection Act on steamboats registered elsewhere than in Canada, but carrying passengers to and from Canada, be repealed and the following substituted therefor, namely:—

That the Steamboat Inspection Act, and the amendments thereto, together with the Canadian rules and regulations relating to the inspection of steamboats be applied to passenger steamboats, other than steamboats holding passenger certificates from His Majesty's Board of Trade, registered elsewhere than in Canada, engaged in carrying passengers from one port or place in Canada to another port or place in Canada, or on any of the lakes, rivers, or coasts of Canada, or engaged in carrying passengers from any port or place in Canada to any port or place out of Canada, or from any port or place out of Canada to any port or place in Canada provided, however, that the provisions of the said Act and the amendments thereto which require Canadian passenger steamboats to carry Canadian certificated engineers, be not applied, when such steamboats, have engineers in charge holding appropriate certificates

issued by the authorities of the country in which they are registered, or other engineers' certificates valid in Canada, for the position in which they are employed, and that the Canadian rules and regulations relating to the inspection of boilers while in course of construction, be not applied, and that the boilers of such steamboats be deemed to have been inspected by a Canadian steamboat inspector, while in course of construction, and that the affidavit of the boilermaker, required by the rules and regulations be dispensed with, and that the rules and regulations relating to the inspection of safety valves be not applied, and that the safety valves of the boilers of such steamboats be passed, if the inspector is satisfied that they are in good reliable working order and of sufficient dimensions to discharge all the surplus steam the boilers can generate beyond the working pressure allowed, when under full fires and engine stopped, and provided that the inspector considers the construction of the valves to be such as will ensure safety.

The Governor General in Council is further pleased to order that the owner or master of every such steamboats shall pay yearly and every year a rate or duty for the inspection of such steamboat of eight cents per ton for every ton gross which such steamboat measures.

RODOLPHE BOUDREAU,
Clerk of the Privy Council

No. 3

THE SECRETARY OF STATE TO THE GOVERNOR GENERAL

(No. 413.)

DOWNING STREET, June 8, 1910.

MY LORD,—I have the honour to acquaint Your Excellency, for the information of your ministers, that Mr. Brodeur, during his visit to this country last year, discussed with the Board of Trade certain questions as to the Merchant Shipping Law of Canada.

2. It appears from Mr. Brodeur's remarks that some doubt is felt in Canada as to the validity of such portions of the Canada Merchant Shipping Law as relate to shipping registered in Canada, which are not in harmony with the Imperial Merchant Shipping Act of 1894, having regard to the fact that section 91 of that Act states definitely that the provisions of the Act relating to registry shall apply to the whole of His Majesty's dominions.

3. I have, however, to request you to point out to your ministers that the effect of the last-mentioned section of the Act of 1894 is qualified by section 735 (2) of that Act,* which provides that "where any Act or Ordinance of the legislature of a British possession has repealed in whole or in part as respects that possession any provision of the Acts repealed by this Act, that Act or Ordinance shall have the same effect in relation to the corresponding provisions of this Act as it had in relation to the provisions repealed by this Act."

4. It will be observed that section 2 of Act 128 of 1873 and section 5 of Act 129 of 1873 of the parliament of Canada repealed, in virtue of the authority given by section 547 of the Imperial Merchant Shipping Act, 1854 (which corresponds with section 735 (1) of the Merchant Shipping Act 1894),* such provisions of the Act of 1854 and of any other Act amending the said Act and forming part of the same, relating to ships registered in Canada, as were inconsistent with the two Canadian Acts of 1873. The last-mentioned Acts were confirmed by Order in Council of November 20, 1873, and the repeal of the provisions of the Imperial Acts thereby effected as regards Canada were applied to the corresponding provisions of the Imperial Merchant Shipping Act of 1894 by section 735 (2) of that Act.

5. There have, however, since 1873 been several amending Acts relative to shipping registered in the Dominion (most of which are embodied in the consolidated Act, chapter 113 of Revised Statutes of 1906), and the latest of these Acts is chapter 65 of 1908, referred to below. None of these amending Acts were confirmed by Order in Council, and if it could be shown, as is probably the case, that the effect of any of the amendments involved a material departure from any provisions in the Imperial Acts, which had not already been repealed by the Acts of 1873, it might be argued that these amendments were invalid by reason of the fact that such provisions of the Imperial Acts had not been repealed, and that the repealing Act had not been confirmed by Order in Council as required by section 735 (1) of the Imperial Act of 1894.

6. The task of comprehensive examination of the whole of the Canadian merchant shipping legislation with the object of ascertaining its validity, or

* Page 4.

otherwise, would be so considerable as to be impracticable; but it would seem that any doubt on the question might be removed by inserting a clause in the next amending Act, specifically repealing all the provisions of the Imperial Merchant Shipping Act of 1894 relating to ships registered in Canada, which are inconsistent with the provisions of the Canada Acts regarding vessels so registered. Such an Act should also contain a suspending clause; and it could then be confirmed by Order in Council in accordance with section 735 (1) of the Imperial Merchant Shipping Act of 1894.

7. An opportunity could be found for this purpose, if your Government could see their way to introduce a further Act to amend Act No. 65 of 1908 in the manner suggested in the following paragraphs. This Act has been under my careful consideration in conjunction with the Board of Trade, and some of its provisions were discussed with Mr. Brodeur when in England.

8. By section 1 of the Act of 1908 power is given to the Governor in Council to make regulations for the registration as British Ships of "ships belonging to His Majesty." No doubt it is not intended under this provision to make regulations affecting His Majesty's vessels of war; but His Majesty's Government would be glad if steps could be taken for the formal amendment of the section to make clear the sense put upon it by your Government, and in this connection I would refer your ministers to subsections 2 and 3 of section 80 of the Imperial Merchant Shipping Act of 1906.

9. By section 3 of the Act the term "coasting voyage" is defined to include "a voyage between any port or place on the eastern coast of Canada and any other port or place on such coast, or in Newfoundland, Labrador, or St. Pierre or Miquelon, or a port or place on the eastern coast of the United States of America, or Mexico or Central America, or in the West Indies or on the eastern coast of South America, not further south than five degrees north latitude, and also means a voyage between any port or place on such coast or on the western coast of Canada and any other port or place on such coast or on the western coast of the United States of America not further south than the harbour of Portland, and not further north than cape Spencer."

10. His Majesty's Government are not aware of the grounds on which the definition of a "coasting voyage" has been thus extended. It appears possible that difficulties may arise under this section; for example, under section 72 (f) of the principal Act of 1906, a master of a ship trading to a port on the eastern coast of America south of cape Hatteras would require to have a certificate of Imperial validity, while under the Act of 1908 a local certificate would enable the master to take charge of a vessel trading to a port south of cape Hatteras down to a point five degrees of north latitude. But under the law of Jamaica it is doubtful whether the authorities there could accept a Canadian coasting certificate as a valid certificate to be held by the master of a vessed bound to Canada from Jamaica, that is, on a vessel which is foreign-going according to Jamaican law. Moreover, the law of that colony would require that a Canadian vessel of under 400 tons or carrying less than forty passengers should carry a certificate mate, though the Canadian law did not require this at the commencement of a voyage. His Majesty's Government would, therefore, suggest, for the consideration of your ministers, that the definition of "coasting voyage" should be reconsidered.

11. By sections 33, 35, and 38 of the Act of 1908 variations are introduced in sections 796, 799, and 806 of the Canada Shipping Act, chapter 113, so that these sections now contain provisions different from the corresponding sections of the Imperial Merchant Shipping Act of 1894.

12. It is presumed that the provisions in question were only intended to apply to vessels registered in Canada, but in any amending Act His Majesty's Government would be glad if it were made clear that the provisions of the sections in question do not apply to vessels which are not so registered, and that, except in the case of vessels so registered, they do not affect the right of appeal given by sections 474 and 478 of the Imperial Merchant Shipping Act of 1894. It was gathered from Mr. Brodeur that it was not the intention of your Government to affect this right of appeal generally, but only to reduce as far as possible litigation in Canada, and that your Government would probably have no objection to making such an alteration in the Act as is suggested above.

I have, &c.,

CREWE.

No. 4

Letter addressed by Mr. H. W. Just, C.B., C.M.G., Assistant Under-Secretary of State, to the Honourable L. P. Brodeur, K.C.,

DOWNING STREET, January 21, 1911

Dear Mr. BRODEUR,—You will remember that when I saw you in Canada you spoke to me upon the question of merchant shipping in the Dominion. You also discussed it with the Board of Trade when you were in England in 1908 and I enclose some notes of the interview which then took place, which I gather express pretty clearly the difficulties which you felt with regard to the matter.

Since you had your interview with the Board of Trade you will have received through the Governor General the Secretary of State's despatch No. 413 of the 8th of June which deals with certain of the questions, but I gather that that despatch has not entirely removed your difficulties and it may perhaps be useful to explain in a letter more fully the attitude of the Board of Trade and the Colonial Office in the matter.

You mentioned to the Board of Trade the questions which arise from the fact of the Imperial legislation of 1854, the British North America Act of 1867, and the Merchant Shipping Act of 1894. The view taken here with regard to these matters is as follows:—

The British North America Act, 1867, did not confer upon the Parliament of Canada any right as to shipping matters to repeal or alter an Imperial Act which extended to Canada. You know the arguments which can be urged on both sides with regard to this matter and the same question of course was discussed between the two Governments in connection with copyright legislation in 1889 and the following years. While the matter cannot be said to be without difficulty the opinion of the legal authorities here has always been that no power of repealing an Imperial Act could be inferred from the general legislative power given to the Dominion and it has never been actually held by the Supreme Court of Canada, or the Judicial Committee of the Privy Council, that the power of repealing an Imperial Act does exist. In the circumstances there appears to be very little likelihood of that opinion being reversed in the Courts and it would therefore be advisable for purposes of procedure to assume that the opinion is correct.

It follows, therefore, that the Act of 1894 did not affect the question one way or another. It was intended to consolidate the law as it stood and it was not intended to effect any change in the powers of Dominion Parliaments. Of course, if the view which has, I know, been held at times in Canada, that power is given by the Imperial Act of 1867 to pass Acts repealing Imperial legislation prior to that date, were to be upheld, it would become a serious question whether the Act of 1894 did not alter the position; but, as I say, the view here is that the Act of 1894 merely confirmed a position which already existed and under which there was no power of alteration of an Imperial Act in the Parliament of Canada.

I may add that in the case of Merchant Shipping the position adopted by the Imperial Government seems to acquire great force from the action of your own Parliament, for in 1873 in legislating as to merchant shipping it was clearly assumed that the powers which were being exercised were being exercised not under any power to repeal Imperial legislation given by the Act of 1867 but under the power given by the Act of 1854, as you will see from referring to the Canadian Acts Nos. 128 and 129 of 1873. Moreover, His Majesty's Government have, on the highest legal advice obtainable, maintained in connection with the Australian Navigation Bill that the Act of 1894 applies to the Commonwealth of Australia created in 1900 and *a fortiori* it would therefore apply to the Parliament of Canada created in 1867. In this connection I would like you to refer to the Secretary of State's despatch to the Governor General of Australia of the 18th of September, 1908, printed in Cd. 4355, a copy of which is enclosed.*

It would appear, therefore, that it must be held that in law the powers of Canada as to Merchant Shipping are governed by the Merchant Shipping Act of 1894, which sets out the power of the legislature of a British possession as regards registered vessels and vessels engaged in the coasting trade (see sections 735 and 736). This is not a question of an old Imperial Act which maintains a position no longer justifiable, but it is in accordance with the recommendations of the Imperial Navigation Conference of 1907 (copy enclosed) which considered the

* See page 25.

matter in, I think, every possible aspect and which was certainly not likely to accept any conclusions which were not to be justified by considerations of convenience and expediency.

It would seem, therefore, that with regard to the legislation of Canada as to registered vessels it would be best if it were validated by a short Act which contained the clause as to its coming into operation laid down in section 735 of the Act of 1894, and as regards coasting trade any new legislation or any old legislation which your Government wish to apply to the coasting trade should be passed in the manner indicated in section 736. It would seem to be necessary that in any such Bill there should be specified precisely what provisions of previous legislation it was proposed to validate.

It would be very convenient, moreover, if a draft of such legislation regarding the coasting trade or registered vessels could be sent to us (semi-officially, if you prefer it) before it was introduced into your Parliament, as it would tend to avoid delay and difficulty such as have occurred in connection with New Zealand and Australian legislation.

Yours sincerely,

(Sgd.) H. W. JUST.

No. 5

Canadian Merchant Shipping Law

NOTES OF INTERVIEW WITH THE CANADIAN MINISTER OF MARINE

A message was received from the Colonial Office that Mr. Brodeur, the Canadian Minister of Marine, wished to discuss some shipping questions with the Board of Trade, and he came over to see Mr. Maxwell this afternoon. The question raised was as to the validity of some of the Canadian Acts relating to merchant shipping. No specific case had arisen, but some misgiving has been felt in Canada as to whether some of their Merchant Shipping Acts were valid, having regard to the provisions of the Imperial Merchant Shipping Act of 1894.

The way they looked at it in Canada was as follows:—Under the old Imperial Act of 1854 they recognized that there were a number of provisions which extended to all parts of His Majesty's Dominion, and Canada, like other places, was bound by those provisions. Then in 1867 the British North America Act was passed, which gave Canada power to legislate with regard to merchant shipping, and under the powers thus conferred a great deal of merchant shipping legislation had been passed in Canada. In 1894, however, the Imperial Consolidation Act was passed and reproduced the provisions of the old Imperial Acts, including those which laid down that certain provisions extended to all parts of His Majesty's Dominions. What was feared in Canada was that the re-enactment of these provisions in 1894 might invalidate legislation passed in virtue of the North America Act of 1867. The class of cases they had more particularly in mind were those relating to the registry of ships. Canadian law deals with this subject, but section 91 of the Imperial Act of 1894 states definitely that the provisions of the Imperial Act relating to registry shall apply to the whole of His Majesty's Dominion. Canadian law is, generally speaking, on the same lines as the Imperial law, and what they think might happen is that a case might come before the Courts in which the Canadian Registry Law might be slightly different to the Imperial law, and the question might arise whether the Canadian law should prevail or the Imperial law. As stated above, no specific case had yet arisen, but a very serious misgiving was felt in Canada on this point.

It was put to M. Brodeur that the point he was raising was really as to how far the British North America Act could be held to repeal the provisions of the antecedent Imperial Merchant Shipping Acts; but he hardly liked to put the question in that way. He preferred to say that the question was as to what effect the British North America Act had on previous Imperial merchant shipping provisions extending to Canada, and what effect the Imperial Merchant Shipping Act of 1894 had on the North America Act and on Canadian merchant shipping legislation passed subsequent to the North America Act.

He agreed that the question was a difficult constitutional and legal one, and that in practice difficulties would not be likely to be raised either by the Imperial Government or the Canadian Government, seeing that Canadian shipping legislation is based on the same principles as the Imperial legislation, and seeing that the Imperial Government have expressly recognized that questions relating to ships registered in a Dominion and to ships engaged in the coasting trade of a Dominion can be dealt with by the Parliament of that Dominion without interference from the Imperial authorities.

What M. Brodeur desired to suggest was that a short Imperial Declaratory Act might be passed, making it clear that the Canadian Shipping legislation, as to which he was doubtful, was valid. He expressly stated that he only wanted this Act to deal with matters relating to ships registered in Canada or engaged in the Canadian coasting trade, and the kind of Act he would like to see passed would be one declaring that, notwithstanding anything contained in the Imperial Shipping Acts, any provisions of Canadian shipping legislation which related to ships registered in Canada and to ships engaged in the Canadian coasting trade should be of full effect and validity. He was informed that his suggestion would be reported to the Board of Trade, and be very carefully considered.

The opportunity was taken to discuss with M. Brodeur the most important of the questions which have been raised in the Official Papers as to the Canadian Merchant Shipping Act of 1908, viz., section 38, which lays down definitely that there should be no appeal from any decision of a Court holding a formal investigation under the Canadian Shipping Act except to the Minister for rehearing. It was pointed out to M. Brodeur that this section might have the effect of depriving men not engaged in the coasting trade and not employed in ships registered in Canada of a right of appeal which they might have under section 478 of the Imperial Act, and he at once recognized that this might be so, but said that it was not in the least intended, and steps would be taken to put the matter right. He explained that the main object of section 38 of their Act of 1908 was to put a stop to the continued litigation and applications to the Courts which had taken place in connection with inquiries as to shipping casualties in Canada, more especially those in which pilots were concerned; it was only meant to deal with a local trouble of their own, and not to touch any rights of appeal which anyone might have under the Imperial Act.

No. 6

FROM THE GOVERNOR GENERAL TO THE SECRETARY OF STATE FOR THE COLONIES

GOVERNMENT HOUSE, OTTAWA, May 3, 1911.

SIR,—With reference to your despatch No. 413 of the 8th of June last,* on the subject of the merchant shipping law of Canada, I have the honour to transmit, herewith, for your information and for transmission to the Board of Trade, copies of an Approved Minute of His Majesty's Privy Council for Canada covering two copies of a Bill to amend the Canada Shipping Act which was introduced in the House of Commons on the 27th March last by the Minister of Marine and Fisheries.

I have, &c.,

(Sgd.) GREY.

Enclosure in No. 6

CERTIFIED COPY OF A REPORT OF THE COMMITTEE OF THE PRIVY COUNCIL, APPROVED BY HIS EXCELLENCY THE GOVERNOR GENERAL ON THE 20TH APRIL, 1911

The Committee of the Privy Council have had before them a report, dated April 6, 1911, from the Secretary of State for External Affairs, to whom was referred a despatch, dated June 8, 1910, from the Right Honourable the Principal Secretary of State for the Colonies, on the subject of the merchant shipping law of Canada.

The minister submits copies of a Bill, No. 155, to amend the Canada Shipping Act, which was introduced in the House of Commons on the 27th March, 1911, by the Minister of Marine and Fisheries.

The minister observes that section 82 of the Bill repeals any provisions of the Merchant Shipping Act, 1894, and amendments as are inconsistent with the Canada Shipping Act; and also contains a suspending clause as suggested in paragraph 6 of Lord Crewe's despatch:

That Act No. 65 of 1908 is amended by section 3 of the Bill so as to make it clear that any regulations approved by the Governor in Council for the registration in Canada of ships belonging to His Majesty would not affect His Majesty's vessels of war. This matter is referred to in paragraph 8 of the despatch.

That the Minister of Marine and Fisheries has not been able to see his way to amend the definition of a "coasting voyage," owing to the nature of the Canadian coasting trade on the Atlantic seaboard. To restrict such voyages to a port north of cape Hatteras would, in many cases, entail the employment

* No. 3, page 7.

of masters having foreign seagoing certificates, as many of these vessels clear for ports which lie south of that line. It would be quite impossible at present to obtain a sufficient number of masters holding these certificates to take charge of such vessels. A certain portion of the coasting trade fleet would accordingly be compelled, owing to the lack of properly qualified officers, to curtail their voyages; in the case of those making the longer voyages it would necessitate the employment of officers at a higher rate of pay. As the business is being carried on an a narrow margin of profits to the owners of the vessels the Minister of Marine and Fisheries is anxious, if possible, to avoid placing any further restrictions on the coasting trade which would have the effect of increasing the expenses of operating the vessels. While the provisions of the Jamaican law might, as pointed out in the despatch, prohibit the clearing of Canadian registered vessels from ports in that island, the minister is informed that the question has never been raised by the officials of that Government although a number of Canadian vessels have, since the amendment to the principal Act was passed in 1908, when engaged in trading between ports in the two countries. Should His Majesty's Government, however, think it advisable to put the matter on a safe basis the minister would suggest that in view of all the circumstances, the Government of Jamaica be asked if it could see its way to instructing its officers to accept Canadian certificates for coasting voyages as at present defined as sufficient to clear in Jamaican ports Canadian vessels engaged in that trade;

That the right of appeal from a dicision of the Wreck Commissioner's Court in Canada in the case of certificates granted in the United Kingdom or in a British possession is provided for in section 76 of the Bill. This amendment complies with the suggestion made in paragraph 12 of the despatch under consideration;

That this Bill will probably be referred to the Committee on Marine and Fisheries for consideration, and that if in the meantime the Board of Trade wish to offer any suggestions on the matters dealt with in the Bill the Minister of Marine and Fisheries will be pleased to give the same his best attention;

The committee, on the recommendation of the Secretary of State for External Affairs, advise that Your Excellency may be pleased to forward a copy hereof, together with two copies of the Bill to amend the Canada Shipping Act, to the Right Honourable the Principal Secretary of State for the Colonies.

All which is respectfully submitted for approval.

(Sgd.) RODOLPHE BOUDREAU,
Clerk of the Privy Council.

No. 7

DEPARTMENT OF JUSTICE,
OTTAWA, April 6, 1911.

Memorandum

There are two questions discussed in these papers.

1st. Does the British North America Act, 1867, give Canada power to legislate on shipping matters and enact laws inconsistent with the Imperial Merchant Shipping Act. Whatever might have been urged with respect to the Imperial Shipping laws enacted prior to 1867, there can be no doubt that where the Act of 1894 is made to apply to "the whole of Her Majesty's dominions and to all places where her Majesty has jurisdiction" that this must include Canada.

2nd. The other question is confirmatory legislation. Mr. Brodeur seems to have suggested a "Short Imperial Declaratory Act," making any doubtful legislation valid.

Mr. Just* suggests a short Canadian validating Act, containing the clause as to its coming into operation laid down in Section 735 of the Act of 1894—that is that the Act is not to come into force until confirmed by Imperial Order in Council and Proclamation thereafter or until such time after confirmation and proclamation as may be specified in the Act.

Our legislation is not, I think, in such a condition as to make it advisable to have any sweeping confirmation. When our first Canadian legislation was passed in 1873, the two Acts, one relating to registration of ships and the other relating to shipping seamen, were reserved by the Governor General and received Imperial sanction. These Acts were consolidated in 1886 and again in 1906 and have also been amended on more than one occasion. Neither the con-

* No. 4

solidations nor the amendments were submitted for Imperial sanction. Moreover, the Acts were only such modifications of the Imperial legislation as might make that legislation applicable to local conditions, but any amendments that might from time to time be made to improve the Imperial Act were not adopted by Canada. Only a thorough and exhaustive examination of the Imperial and Canadian legislation will show what portions of our legislation require confirmation and what should be repealed or amended.

F. H. GISBORNE.

No. 8

DEPARTMENT OF JUSTICE,
OTTAWA, April 11, 1911.

Memorandum for the Minister:

My objection to some of the existing Canadian legislation with regard to merchant shipping in relation to the corresponding Imperial enactments is illustrated by the following:—

Section 916, Canada Shipping Act, R.S.C. 1906, chapter 113, as follows:—

"If, in any case of collision, it appears to the court before which the case is tried, that such collision was occasioned by the non-observance of any of such regulations, the vessel or raft by which such regulations have been violated shall be deemed to be in fault, unless it can be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said regulations necessary."

The corresponding British section is subsection 41 of section 419, Merchant Shipping Act, 1894 (57-58 Victoria, chapter 60), as follows:—

"Where in a case of collision it is proved to the court before whom the case is tried, that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulations necessary."

The Canadian section 916, above quoted, first appears in the Imperial Merchant Shipping Act of 1854, chapter 104, sections 298 and 299, and is reproduced in the Imperial Act 25 and 26 Victoria, chapter 63, section 29. It was first enacted in Canada in the statutes of the Province of Canada, 1864, chapter 13, section 6. It was repeated for the Dominion in 1868, chapter 58, section 6, and again in 1880, chapter 29, section 6, and again in the Revised Statutes, chapter 79, section 6, from which it was taken into the present Canada Shipping Act as section 916.

Now this section was repealed by the Imperial Parliament and the present one substituted by 36-37 Victoria, chapter 35, section 17, from which it was taken into the Merchant Shipping Act, 1894, as section 419, subsection 4, above quoted.

Under the Merchant Shipping Act, 1894, section 735, corresponding to section 547 of the Merchant Shipping Act of 1854, a colonial legislature has power by Act or Ordinance, confirmed by Her Majesty in Council, to repeal wholly or in part any provisions of the Act relating to ships registered in that possession. The Canadian enactment, represented by section 916 of the Canada Shipping Act, was never reserved or confirmed. For example of Acts which have been reserved and confirmed, see 36 Victoria, chapters 128 and 129, at the beginning of the Canadian Acts of 1874.

It is plain that in these circumstances section 916 of the Canadian Shipping Act can have no force in itself, and that in so far as it differs from section 419, subsection 4, of the Merchant Shipping Act, 1894, it does not state the law. It is, however, a most important enactment regulating burden of proof in collision cases.

This one case sufficiently demonstrates the impropriety of any general confirmation either by the Imperial Parliament or by the Parliament of the Dominion (assuming the later to have the power) of the existing Canadian legislation.

I do not know and it cannot be ascertained without careful and tedious inquiry and comparison what other Canadian sections there are in the same case as section 916.

The proper and scientific manner for dealing with our Canada Shipping Act is, in my opinion, to eliminate altogether those sections which correspond with the Imperial sections which have application to our waters, and to rely in those respects upon the law as found in the Imperial statutes, which is the

Imperial and constitutional source of the general legislation relating to merchant shipping. The Canadian Act would thus be confined to such additional and consistent provisions as are required or have been competently enacted with respect to Canadian shipping. Any inconsistent enactments such as section 916, which are discovered, and which have not been confirmed in the manner provided by the Merchant Shipping Act, should be either confirmed in that manner or struck out as *ultra vires*.

If any different system is to be adopted it must involve the modification of section 735 of the Merchant Shipping Act, 1894, so as to give place to it.

(Sgd.) E. L. NEWCOMBE.

No. 9

May 8, 1911.

Memorandum:

On the question whether the British North America Act of 1867 had the effect of conferring upon the parliament of Canada any right to pass legislation which might conflict with the provisions of the Imperial Merchant Shipping Act of 1854, I am quite of the opinion that no power to repeal or vary this Imperial statute can be inferred from the general legislative power given to the Dominion Parliament with regard to the subject of navigation and shipping. No doubt, strong argument can be advanced in support of the opposite view, and it may be that the question is a doubtful one, but certainly my opinion about it is distinct.

So far as I am aware, it has never been held by either the Supreme Court of Canada or the Judicial Committee that the Canadian Parliament has the power of repealing any Imperial Statute which existed in 1867, and which applied to Canada.

But with respect to Imperial Shipping Laws, whatever might be said with regard to those enacted before 1867, I cannot see how there can be any room for doubt since the passing of the Imperial Act of 1894, which is expressly made to apply to "the whole of Her Majesty's dominions and to all places where Her Majesty has jurisdiction."

I have very carefully considered Mr. Just's letter of January 21, 1911, and I must say that I agree in the views he expresses.

In regard to what should be done in respect of confirmatory legislation, I think it would not be advisable that there should be any general confirmation of the enactments at present on the Canadian statute book.

When our first Canadian legislation was passed, in 1873, the two Acts (one relating to registration of ships and the other relating to shipping seamen) were reserved by the Governor General and received Imperial sanction. These Acts were consolidated in 1886, and again in 1906, and have also been at different times amended. Neither the consolidations nor the amendments were submitted for Imperial sanction, and the statutes themselves, as well as subsequent amendments, were rather in the line of efforts to make the Imperial legislation better applicable to local conditions than efforts to improve the provisions of the Imperial Act.

As an illustration of the present situation, and the embarrassment which would be caused by general confirmation of the Canadian enactments as they now stand, I would call attention to the provisions with respect to collisions. Subsection 4 of section 419 of the Imperial Act of 1894, declares that if it is proved that "any of the collision regulations have been infringed," the ship infringing shall be deemed in fault unless it is shown that the circumstances made departure from the regulation necessary.

The corresponding provision of the Canadian Shipping Act, section 196, is that if it is shown that "such collision was occasioned by the non-observance of any of such regulations" the vessel infringing shall be deemed in fault unless it is shown that the circumstances made departure from the regulations necessary.

Thus, under the British statute, wherever infringement of any collision regulations is shown, the burden is upon the ship infringing to justify the infringement, while under the Canadian statute the burden is not shifted to the infringing ship unless it is shown that the collision was occasioned by the infringement.

This difference is of great practical importance and is merely one illustration of the difficulties which would be created by any general confirmation of existing Canadian legislation on the subject.

I may point out that the Canadian section 916 appears in the Imperial Merchant Shipping Act of 1854, and is reproduced in the Imperial Act of 1862. It was first enacted in Canada in 1864, repeated for the Dominion in 1868 and again in 1880, and in the Revised Statutes of 1886 and again in 1906.

But this section was repealed by the Imperial Parliament and the change to the present law on the subject made, by the Imperial Act of 1873, from which it was taken into the Imperial Merchant Shipping Act of 1894.

The Canadian enactment was never reserved or confirmed, as is requisite under section 735 of the Imperial Merchant Shipping Act of 1894, corresponding to section 547 of the Merchant Shipping Act of 1874.

It could not be ascertained, without careful and tedious inquiry and comparison, what other sections of the Canadian Statute may be in the same position as this section 916.

As to what should be done, I am strongly of opinion that the Canadian Act ought to be carefully gone over, and such sections as correspond with Imperial sections which apply to our waters should be eliminated, leaving us to rely in such respects upon the law as found in the Imperial statutes. I look upon the Imperial Parliament as the constitutional source of the general legislation relating to Merchant Shipping, and I think the Canadian legislation on the subject ought to be confined to such additional and consistent provisions as may be required or have been competently enacted with respect to Canadian shipping.

If other inconsistent enactments, in addition to section 916, are discovered, and these have not been confirmed in the manner provided by the Imperial Act, they should either be now struck out or else confirmed in that manner.

But if any different system were to be adopted, it would involve the modification of the present section 735 of the Imperial Merchant Shipping Act of 1894 so as to give place to it.

(Sgd.) A. B. AYLESWORTH.

No. 10

Rt. Hon. S. Buxton to Hon. L. P. Brodeur

Board of Trade, Whitehall Gardens, S. W., June 9, 1911.

Dear Mr. Brodeur,—I enclose you copy of a note prepared by the Colonial Office in reference to your point.

Yours truly,
(Sgd.) S. BUXTON.

Enclosure in No. 10

Mr. Buxton,—Mr. Brodeur complained that the Act of 1894 upset all that had been done in Canada from the time of the British North America Act, 1867 up to 1894.

In 1867 the power which Canada had to legislate as to shipping was that given by the Merchant Shipping Act of 1854 to regulate registered shipping. The power given by section 547 of that Act was identical with that given in section 735 of the Merchant Shipping Act, 1894. Under that power two Acts were passed in Canada in 1873, Nos. 128 and 129, and these Acts repealed, as regards registered shipping certain provisions of the Imperial Merchant Shipping Act 1854.

By section 735 (2) of the Act of 1894 the effect of these repeals is applied to the corresponding provisions of the Act of 1894, and therefore no restriction of or interference with Canadian merchant shipping legislation has resulted.

It is true, however, that since 1873 Canadian Acts regarding registered shipping have not been passed with a suspending clause or confirmed by Order in Council. This was required as much by the Act of 1854 as by the Act of 1894 and the provisions were equally invalid so far as they effect provisions of the Merchant Shipping Act which were not repealed as regards Canada by the Acts of 1873 before the Act of 1894 as after it, for the Act of 1894 merely repeated the provisions of the Act of 1854. As regards coasting trade the power to deal with it was first given to Canada in 1869 and it was given in the same shape as it is now given by section 736 of the Merchant Shipping Act, 1894. That Act, therefore, neither increased nor diminished in any respect the legislative power of Canada. I annex a despatch and a letter* which set forth at greater length what is said in this minute.

A.B.K.
2/VI
H.W.J.
2/6

* Nos. 3 and 4.

No. 11

The Honourable L. P. Brodeur to the Rt. Hon. Sydney Buxton.

June 27, 1911.

Dear Mr. Buxton,—I am much obliged for your note, enclosing copy of a memorandum with reference to Merchant Shipping legislation in Canada.

Since the Canadian legislation of 1873 on the subject was assented to by her late Majesty, Queen Victoria, certain amendments have from time to time been made to the law in Canada, which, however, do not appear to have been confirmed, as required by the provisions of the Merchant Shipping Act of 1894. Certain amendments have also been made to the Merchant Shipping Act during that period. For example, the basis for calculating the liability for damages in the case of collisions has been altered. Section 922 of the Canada Shipping Act declares the basis to be the gross tonnage in the case of steamships; section 69 of the Merchant Shipping Act 1906 makes it the registered tonnage with the engine room space added. The Canadian legislation was, I understand, copied from an old Merchant Shipping Act. The question arises, was the provision of the Merchant Shipping Act of 1854 repealed by the Canadian Act of 1873, seeing that the legislation was identical, and the repealing clause in the Act of 1873 only applied to such Imperial enactments as were inconsistent therewith?

Another instance of such conflicting provisions in the Imperial and the Canadian Acts is to be found in section 419 of the Imperial Act 1894 and section 196 of the Canada Shipping Act in regard to the observement of collisions regulations.

Having regard to these and similar cases, the Canadian Government are anxious to remove all doubt as the validity of any of the provisions of the Canada Shipping Act. As soon as Bill No. 155 has been approved by His Majesty in Council, the Canadian legislation on merchant shipping in Canada up to the present time will be validated. If, later on, the Canada Shipping Act is revised, careful consideration can be given to the points of difference between the Imperial and the Canadian Acts. In the meantime, all doubt as to what is law on the subject in Canada will have been removed.

Yours very sincerely,

L. P. Brodeur.

No. 12

The Rt. Hon. Sydney Buxton to Hon. L. P. Brodeur, K.C.

Board of Trade, Whitehall Gardens, S.W., July 7th, 1911.

Dear Mr. Brodeur,—I duly received your letter of the 27th June respecting Canadian merchant shipping legislation, and I am glad that the information it contains gives me an opportunity of considering one or two specific cases in which the Canadian Government feel doubt as to the validity of their legislation.

As you know, the questions involved are somewhat intricate and I am anxious that they should be very carefully considered by my department and by my legal adviser. I will take care that the question is dealt with as soon as possible, and will send you a reply shortly.

I am, yours very truly,

(Sgd.) Sydney Buxton.

No. 13

THE SECRETARY OF STATE TO THE GOVERNOR GENERAL

DOWNING STREET, November 29, 1907.

MY LORD,—I have the honour to acknowledge the receipt of Your Excellency's despatch of the 2nd of October, forwarding a copy of the Navigation Bill which has been issued by your ministers.

2. His Majesty's Government have much pleasure in learning of the concurrence of your Prime Minister in the view that the result of the Conference proves the value of such meetings for the free and full discussion of complicated and important subjects, and they gladly recognize that the great majority of the recommendations of that Conference have been followed by your Government in recasting the Navigation Bill.

3. In so far as the Bill conforms to the resolutions of the Conference, His Majesty's Government are in full accord with its provisions. At the Conference His Majesty's Government recognized, and they desire to put the view on record in the most formal manner possible, that every Dominion has the full right and power to regulate, not only vessels registered in that possession but also all vessels engaged in the coasting trade of that possession (as defined by the 10th resolution of the Conference) so long as they are engaged in that trade.

4. In certain cases, however, the legislation proposed goes beyond those limits by purporting to regulate vessels which do not engage in the coasting trade and vessels while on the high seas before or after engaging in the coasting trade. In some other cases resolutions accepted by the representatives of the Commonwealth at the Conferences have—probably by inadvertence—not been carried into effect.

5. I enclose, for the consideration of your ministers, copy of a letter and a memorandum† by the Board of Trade suggesting alterations in certain provisions of the Bill which, for either of the reasons explained in paragraph 4 of this despatch, His Majesty's Government regard as open to criticism. I hope that your ministers will find it possible to give effect to the suggestions contained therein; should, however, any of the points raise difficulties, I trust that your ministers will communicate freely with His Majesty's Government, with a view to arriving at a settlement before the Bill is finally passed by the Commonwealth Parliament; so that no delay may arise in the issue of the Order in Council required by sections 735 and 736 of the Imperial Act of 1894 to give the provisions of the Bill legal validity.

I have, &c.,

ELGIN.

Enclosure in No. 13

BOARD OF TRADE TO COLONIAL OFFICE

MARINE DEPARTMENT, 7 WHITEHALL GARDENS,

LONDON, S.W., November 22, 1907.

SIR,—With reference to your letter of the 7th instant, respecting the Commonwealth Navigation Bill, I am directed by the Board of Trade to state that the Bill has been carefully examined, and its provisions have been discussed at an informal Conference of representatives of the Colonial Office, Board of Trade, and shipowners. The enclosed memorandum, which is forwarded for the Secretary of State's consideration, indicates the points of importance in the Bill to which the Board of Trade consider that special attention should be drawn.

The principles by which the Board have been guided are those laid down at the recent Colonial Navigation Conference which was held to consider the differences between Australian and New Zealand shipping legislation and the Imperial Acts, and which was attended by representatives of Australia and New Zealand, of the Colonial Office and Board of Trade and of shipowners and seamen.

The Resolutions passed by that Conference may be said to establish two main principles:—

(1) That ships registered in Australia, or New Zealand, and ships engaged in the coasting trade of those dominions should be governed by laws made by the Australian and New Zealand Parliaments;

(2) That other ships should be governed by the Imperial law.

† Not printed.

The first principle implies that within the limits mentioned Australian and New Zealand shipping legislation will not be subject to review on the ground that it is at variance with the Imperial Merchant Shipping Acts, and the full responsibility for such legislation rests with the dominions.

The second principle means that outside the limits referred to, when there is a difference between the shipping law common to the whole Empire and the Dominion legislation, ships trading to Australia and New Zealand must be governed by the Imperial law.

This law is amended from time to time to meet changing needs and conditions, and in considering any such amendments special weight would attach to any representations made by the Government of a dominion; but in the interest of all concerned, it is essential that there should be no doubt as to the sphere within which the Imperial law for the time being in force should prevail.

It is with a view to assist in removing any possible doubt on this point that the Board have formulated the suggestions contained in the enclosed memorandum; and if it is made clear in the Bill that the resolutions passed at the recent Colonial Navigation Conference are complied with, no question can arise as to withholding assent when the measure is finally passed by the Commonwealth Parliament.

I have, etc.,

WALTER J. HOWELL.

No. 14

THE GOVERNOR GENERAL OF AUSTRALIA TO THE SECRETARY OF STATE

GOVERNOR GENERAL'S OFFICE, MELBOURNE, June 17, 1908.

My LORD,—Referring to your Lordship's predecessor's despatches dated November 29, 1907, and December 18, 1907, I have the honour to transmit, herewith, for your Lordship's information, a copy of a despatch which has been addressed to me by my Prime Minister, on the subject of Commonwealth legislation in regard to navigation and shipping.

I have, etc.,

NORTHCOTE,
Governor General.

Enclosure in No. 14

PRIME MINISTER, MELBOURNE, June 15, 1908.

My LORD,—I have the honour to inform Your Excellency that the despatches of the Secretary of State for the Colonies, dated November 29 and December 18 last, have been fully considered by this Government who now desire to take advantage of the invitation of Lord Elgin to communicate freely with His Majesty's Government on the important matters dealt with in the memoranda of the Board of Trade.

2. Ministers have noted the recognition by His Majesty's Government of the right of the dominions of the Empire to legislate in regard to navigation. This right, so far as Australia is concerned, had already been conceded by the assent by His Majesty to the Imperial Act covering the Constitution of the Commonwealth. In thanking the Secretary of State for placing on record the views of His Majesty's Government, in this regard, they do not wish to be taken as admitting that paragraph 3 of the despatch of November 29 is an exhaustive statement of the right of the Australian Parliament to legislate in regard to navigation and shipping.

3. It is regretted that the opinion should be held that the provisions of the Navigation Bill now before Parliament go beyond the resolutions of the Conference held last year. Ministers consider that the contrary is the case, as every effort was made in drafting the measure to conform precisely to the determinations which had been agreed upon, and they trust that when the following observations are considered the Colonial Office and the Board of Trade will concur with that view.

4. I forward herewith a minute by the Department of Trade and Customs dealing in some detail with the minor aspects of the case presented by the Board of Trade, but propose myself to offer some remarks on the more important general principles involved. This is essential both in order to admit

of that frank and full criticism which alone can form the basis of a stable understanding between the mother country and the oversea dominions, and because the respective Governments and Legislatures interested have eventually to justify themselves before their constituents for their measures and the action taken in connection with them.

5. Before doing so, however, I desire to call attention to two passages in the documents which accompany the Secretary of State's despatch phrased in a manner absolutely without precedent in all the correspondence which has taken place between the Imperial Government and the Government of the Commonwealth; these are the concluding words of Sir Walter Howell's Memorandum: "No question can arise as to withholding assent when the measure is finally passed by the Commonwealth Parliament", or rather the implication contained in that phrase, and the abrupt declaration contained in the note on clause 369: "This is a limitation of a power expressly given by the Imperial Act, and cannot be agreed to."

6. As they occur in a memorandum forwarded by the Secretary of State they are presumably endorsed by him, but ministers hope that the fact is that they were transmitted without being closely examined, and that the natural presumption as to their endorsement is not well founded. Their occurrence in this communication has aroused considerable feeling in Australia as they seem to indicate that the question of deciding whether or not the Federal Parliament has exceeded the powers conferred on it by the Constitution is to be determined by an official of a Government department in Great Britain.

7. The Constitution of the Commonwealth, it will be remembered, is an Imperial Act of no less validity than the Merchant Shipping Act or any other measure of legislation by the Parliament of the United Kingdom. Besides conferring rights of legislation on the Parliament of the Commonwealth it expressly provides for the creation of a judicial tribunal among whose chief functions is that of determining whether or not these rights have been exceeded, and Ministers respectfully submit that this tribunal alone possesses the power to determine that question.

8. It is not suggested that the power of Your Excellency conferred by section 58 of the Constitution is in any way limited, but that power, exercised according to the discretion of Your Excellency, is not dependent on advice from the Board of Trade; nor is it sought to derogate in the least degree from the indisputable right of the King, as expressed in section 59, though it is, of course, presumed that His Majesty will exercise this power in accordance with long established precedent in cases where no Imperial and international relations are involved.

9. At the present stage ministers do not regard it as necessary to discuss these well accepted constitutional principles, as they trust that on reconsideration of the expressions to which exception is taken the Secretary of State will see his way to withdraw from them the official endorsement apparently conferred by his despatch.

10. Reference is made in the concluding paragraph of Lord Elgin's despatch of the 29th November to a presumed necessity for the passing of an Order in Council under the provisions of section 735 and 736 of the Merchant Shipping Act of 1894. This question has been considered by the law advisers of the Commonwealth who point out that the former section (735) empowers the legislature of any British possession by any Act confirmed by His Majesty in Council to repeal wholly or in part any provisions of the Act of 1894 (other than those of the 3rd part thereof, which refer to emigrant ships), relating to ships registered in that possession. The Navigation Bill does not purport to repeal any provisions of the Merchant Shipping Act relating to ships registered in the Commonwealth, and this Government are not aware that any of its provisions are repugnant to any provisions of the Merchant Shipping Act expressed to extend to the whole of His Majesty's dominions. It does not appear, therefore, that an Order in Council under section 735 of the Act of 1894 will be necessary to give legal validity to the Commonwealth Act when passed.

11. As regards section 736 it is pointed out that the power of the Commonwealth Parliament to legislate as to navigation and shipping is founded on sections 51 (1) and 98 of the Constitution of the Commonwealth, and is quite independent of the very limited power of legislation given by section 736 of the Merchant Shipping Act. It is submitted, therefore, that any Act of the Commonwealth Parliament on the subject which is not repugnant to any Imperial law expressly extending to the Commonwealth is valid without any Order in Council under section 736. This matter is more fully dealt with by

Mr. R. R. Garran in a memorandum furnished to the Australian Royal Commission on the Navigation Bill, and printed as Appendix E to the report of that body.*

12. The two principles stated to have been deduced from the resolutions of the Conference appear to indicate a misconception of the real meaning and purpose of these resolutions, which has probably been the reason for the opinion that the Navigation Bill has gone beyond the agreements reached at the Conference.

13. The first of these principles may be accepted, but that the second correctly epitomises the results of the Conference cannot be conceded. If that principle had been generally admitted, quite a large part of its discussions would have been without object, and the delegates, or some of them at any rate, would have left the Conference with most erroneous ideas as to what they had really agreed to.

14. The misunderstanding arises from reading resolution No. 9 as if it stood alone, and purported to state the only classes of vessels to which Australian laws are to apply. The form of words used may lead to that conclusion but the resolution must be considered in the light of the antecedent facts and be read in conjunction with all the other resolutions of the Conference.

15. Nowhere in the resolutions or the report of the Conference is there to be seen any assertion of this second principle as stated, certainly it was never formulated, and it is submitted that all the circumstances combine to indicate that so sweeping a deduction cannot fairly be considered as having been in the minds of the delegates.

16. As was stated during the Conference, the laws now in force in some of the Australian States apply, at any rate, as regards certain parts to vessels of all nationalities which happen to be in the ports of those States irrespective of the classes of trade they are engaged in, or the countries whence they have come or whither they are proceeding. It was also intimated that it was not the intention of Australia to surrender any of the rights now possessed in regard to such ships and it is submitted that such was the understanding at the Conference.

17. If resolution No. 9 were to be regarded as defining and absolutely limiting the classes of vessels to which Australian laws could be made applicable, there clearly would have been no necessity for, *e.g.* resolutions 2, 3, 4, 5, and 6, which indicate certain conditions that are to apply only to ships registered in Australia or engaged in our coasting trade. The indisputable inference from this fact is that other parts of the law are to be applicable to all vessels within our territorial limits.

18. Moreover, it will be remembered by those who were present at the Conference that the power to require all vessels to be surveyed was much discussed and objected to by some of the delegates, but if the principle had been assented to as stated this question was, of course, disposed of. In addition the Bill provides for many things to be done in Australian offices by or under supervision of Australian officers—such as the engagement and discharge of seamen; things done in Australian courts, such as marine inquiries, returns and reports required to be made by masters in Australian ports, etc., as to which it cannot be supposed that the Australian law should exempt oversea ships. One result of assent to this principle would be to lead to the transfer of ships from the Australian register, an easy and inexpensive process.

19. Ministers appreciate the attention which has been given to this question by the Board of Trade, and are grateful for the assistance afforded by the suggestions of the memoranda forwarded. They have endeavoured, as far as possible, to give effect to these, and where, in their opinion, it would be undesirable in the best interests of those on whose behalf they intend asking Parliament to legislate to adopt the proposals put forward, they have stated their reasons in the desire that the full interchange of views may lead to a common understanding.

I have, etc.,

ALFRED DEAKIN.

Governor General,

His Excellency the Right Honourable Lord Northcote,
G.C.M.G., G.C.I.E., Etc., Etc., Etc.

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* Page 21.

No. 15

Summary of Evidence and Memorandum re Jurisdiction by Hon. R. R. Garran

AREA OF JURISDICTION

1. There is no absolute limit of area provided that the law (*a*) is for the "peace, order, and good government of the Commonwealth," and (*b*) is not repugnant to an Imperial law applicable to the Commonwealth.

SUBJECT-MATTERS

2. Provided the above-mentioned requirements are complied with, then the Commonwealth has power to control inter-state and external commerce, and this necessarily involves power to control vessels, which, though not engaged in such commerce, use the inter-state or national highways.

AS TO THE EFFECT OF COMMONWEALTH LEGISLATION UPON ANY IMPERIAL ACT

3. With the concurrence of the King in Council, the Commonwealth Parliament may, under section 735 of the Merchant Shipping Act, repeal (with certain exceptions) any of the provisions of the Merchant Shipping Act relating to ships registered in Australia. Otherwise it may not directly repeal or modify any part of that Act, but may supplement its provisions by others which are not repugnant to the Imperial laws extending to Australia, e.g. If the Merchant Shipping Act in a part extending to Australia, provides that certain ships must carry three engineers, the Commonwealth Parliament can require those ships, when within its jurisdiction to carry four, but cannot make it lawful for them to carry two.

CONTROL OF LIGHTS, SIGNALS, FERRIES, ETC.

4. The powers of the Commonwealth incidental to the control of navigable highways, would give the Federal Parliament power to deal with such matters as lights, signals, rule of the road, licensing of officers, safety, etc., on ships trading within the limits of any State, e.g. Since the ferry boats of Sydney use a federal highway, they would be under federal law.

REPEAL OF STATE NAVIGATION LAWS

5. The Parliament of the Commonwealth has power to expressly repeal existing State navigation laws.

FOREIGN SHIPS

6. As a matter of law the Commonwealth has the same power to deal with foreign as with British ships, though treaty obligations may affect the exercise of this power.

STATE-OWNED SHIPS

7. The Federal Parliament has also power to deal with State-owned ships when they engage in federal commerce, or use a federal highway.

COURTS OF INQUIRY

8. In addition, the Federal Parliament may appoint courts to hold inquiries on foreign boats lost after leaving the Commonwealth jurisdiction, though with the parties and witnesses outside our jurisdiction, it might be impossible to give effect to the law.

HARBOUR AND WHARFAGE DUES

9. It has a limited power of control over harbour boards, and can to a certain extent regulate wharfage charges.

REGULATION OF COASTING TRADE

10. The Commonwealth Parliament has, in addition to the powers formerly possessed by the States, full power to regulate the coasting trade of the Commonwealth as a whole—which previously when it passed beyond the limits of a single State, was practically foreign trade.

MINUTE PAPER

The Royal Commission on the Navigation Bill has forwarded, for consideration and reply, a Memorandum by Mr. R. E. Cunliffe, Solicitor to the Board of Trade, dated October 14, 1904,* and has requested me to amplify the evidence already given on the legal standing and powers of the Commonwealth in regard to navigation and shipping.

2. The occasion of Mr. Cunliffe's memorandum is the New Zealand Shipping and Seamen's Act of 1903; but it deals with the powers of colonial legislatures generally in relation to merchant shipping.

3. Mr. Cunliffe is impressed with the importance of preserving uniformity throughout the Empire in respect of such legislation. He deals with the question as one of policy as well as of law; and his attitude on the question of policy appears to lead him to a much narrower view of colonial legislative powers than can, in my opinion, be supported.

4. In this Memorandum, I deal solely with the question of law, which is the only question referred to me. The subject has two main branches:—

(*a*) The positive legislative power of colonial legislatures generally, and of the Commonwealth Parliament in particular, with regard to navigation and shipping, apart from the Merchant Shipping Act 1894; and

(*b*) The extent to which that power is enlarged or restricted by the provisions of the Merchant Shipping Act.

(A) THE POSITIVE LEGISLATIVE POWER

5. A colonial legislature has power to make laws for the "peace, order, and government of the colony—either generally (in the case of a colony with a unitary constitution) or with regard to specific subjects (in the case of a colony with a federal constitution). The Commonwealth Parliament, in particular, has power to make laws for the peace, order and good government of the Commonwealth with respect to (*inter alia*) "Navigation and Shipping."

6. This legislative power has two limitations. The first is sometimes expressed to be that colonial laws—except where exterritorial operation is expressly given to them by the Imperial Parliament—only operate within the territorial limits of the colony. This limitation is, however, nowhere expressed in any colonial constitution. It appears to me that there may be cases in which it is necessary for the peace, order, and good government of a colony that it should be able to pass a law to operate exterritorially; and that the grant by the Imperial Parliament of plenary legislative power for the purpose of such peace, order and good government is wide enough to sanction exterritorial operation in such cases. While admitting that the cases in which the necessity arises, and in which, therefore, the exterritorial operation can be conceded, are probably rare, I would prefer to state the first limitation in the words of the constitutional grant—namely—that the operation of the laws of a colony is limited to the purposes of the peace, order, and good government of the colony.

7. The second limitation is that a colonial law, which is repugnant to an Imperial Act which by express words or necessary intendment is applicable to the colony, or repugnant to any order or regulation under any such Act—is, to the extent of such repugnancy, but not otherwise, void (Colonial Laws Validity Act). To create the invalidity, it is not enough that the Imperial law and the colonial law both deal with the same matter, and deal with it differently; they must be actually repugnant one to the other—inconsistent one with the other. The colonial law may go further than the Imperial law—may require compliance with further or more stringent conditions, but it is not therefore necessarily repugnant. Moreover, it is not enough that the Imperial Act is worded so generally that it is capable of being construed to extend to the colony, or that it is not in express words limited to the United Kingdom. The application to the colony must be either by express words or by necessary intendment—i.e. it must be incapable of being construed as not extending to the colony.

8. Subject to these two limitations the legislative power of a colony with respect to navigation and shipping—as with respect to other subjects—is plenary.

9. It is necessary to emphasize this positive legislative power because it appears to me that in the memorandum under discussion it is largely overlooked, and it is assumed that colonial legislative powers with respect to navigation and shipping depend wholly or chiefly, on certain express provisions of the Merchant Shipping Act, 1894, e.g., sections 735 and 736.

* Page 30.

(B) THE EFFECT OF THE "MERCHANT SHIPPING ACT 1894" UPON COLONIAL LEGISLATIVE POWERS

10. Mr. Cunliffe, in his opening remarks, states that sections 735 and 736 of the Merchant Shipping Act, 1894, together with section 713, make it clear "that from a general point of view the Imperial Act does not contemplate that a colony shall, as regards the matters dealt with by the Act, do more than legislate (by way of specific repeal with an implied or recognized power of new enactment) for ships registered in the possession, or regulate its own coasting."

11. From these remarks, as I understand them, I entirely dissent. Sections 735 and 736 are affirmative, not negative, they confer certain specific legislative powers upon colonial legislatures, but certainly cannot be construed as depriving those legislatures of all or any powers not mentioned.

12. Section 735 confers a very special legislative power. It empowers a colonial legislature to repeal, as regards the colony, provisions of the Imperial Act which extend to the colony. That is a power which, apart from this provision, no colonial legislature would have. To construe the grant as limiting in any way the antecedent powers of colonial legislatures in regard to shipping generally is opposed to all canons of interpretation.

13. As to section 736, it is not easy to discover either its exact purpose or its exact effect; though its history so far as it appears on the statute-book, affords some guidance. It is a re-enactment of section 4 of the Merchant Shipping (Colonial) Act, 1869, which repealed sections 163 and 328 of the Customs Consolidation Act, 1853. The Act of 1853 embodied the protective policy of the old navigation laws. Section 152 restricted the coasting trade of the United Kingdom to British ships. Section 163 did the same with respect to the coasting trade of any British possession in Asia, Africa or America; though section 328 enabled the Queen to relax this provision with respect to any colonies upon an address from their legislatures. The coasting trade of the United Kingdom was thrown open to the world in 1854; but the restriction as to the colonies appears to have remained in force until the passing of the above-mentioned Act of 1869. From the terms in which sections 163 and 328 of the Act of 1853 were repealed by the Act of 1869, it appears that the main object of the new substantive provision was to enable the colonies to legislate directly as to the vessels in which their coasting trade should be carried on. It was clearly intended to be an enabling, not a restrictive clause; to grant to the colonies (subject to conditions), certain new powers of legislation, but not to take away any existing powers. At the same time it is not easy to see what new powers it conferred. Even before 1869, a colony, in virtue of its general legislative power, could make laws to "regulate its coasting trade," provided that such laws were not repugnant to any Imperial Act extending to the colony. The repeal of section 163 of the Act of 1853 extended the powers of colonial legislatures by removing a direct statutory prohibition. But how does the substantive enactment extend their powers? It can hardly be contended that it enables a colony to pass laws repugnant to an Imperial Act extending to the colony. It may perhaps be argued (as was suggested by the Imperial Crown Law officers during the discussion in England of the Commonwealth Constitution Bill—see Quick and Garran, p. 362) that it gives an exterritorial operation to the laws of a colony; but this is not expressed. However, the section was re-enacted verbatim in the Act of 1894. If it is hard to see what it adds to the powers of colonial legislatures, it is at least impossible to regard it as taking anything away. It is affirmative in form and in apparent intention; and it cannot be supposed that in the guise of a gift of power the Imperial Parliament intended to make a sweeping inroad upon the legislative powers of the whole of the self-governing colonies of the Empire.

14. The Merchant Shipping Act 1894 is not expressed to extend, as a whole, to the whole of the King's dominions. Certain parts of it are expressed so to extend (e.g., Parts I, VIII, XIII). Certain other parts are given a limited and specified application beyond the United Kingdom, whilst other parts contain no general application clauses at all. Mr. Cunliffe, in his remarks as to the application of the several parts of the Act, appears to infer, merely from the absence of limiting words in particular sections, that those sections were intended to apply throughout the British dominions. Such an inference—if it is meant that the sections in question extend to the colonies within the meaning of the Colonial Laws Validity Act—appears to me to be forbidden by the clear terms of that Act. I propose to deal in order with his remarks as to the application of the several parts.

15. As to Part I, Mr. Cunliffe shows that this part is almost wholly of Imperial application. It may be mentioned that the Commonwealth Bill does not deal (except in clause 417) with any of the matters covered in this part.

16. As to Part II, Mr. Cunliffe draws from section 264 an inference in derogation of colonial legislative powers, which appears to me quite untenable. He says, in effect, that section 264 empowers the legislature of a British possession to apply to British ships registered at, trading with, or being at any port in the possession, any provisions of Part II (only) which do not otherwise so apply; and he suggests that the section impliedly limits the powers of colonial legislatures to exercising the powers specified, or at least that it is " a restricting rather than an enabling power." But Mr. Cunliffe does not quite accurately state the purport of the section; it does not empower colonial legislatures to legislate in the direction mentioned, but declares that if such legislature does so, the law shall have effect throughout the British dominions as if enacted in the Imperial Act. This is obviously an enabling provision; it enables a colonial legislature, in effect, to pass an Imperial law. No inference whatever can be drawn to restrict its power to pass colonial laws. And, apart altogether from these considerations, it is submitted that the legislative powers of self-governing colonies, cannot be whittled away, as suggested, by vague " inferences " and " implications." That is a state of affairs which was ended, once and for all, by the Colonial Laws Validity Act.

17. As to Part III, I do not altogether agree with Mr. Cunliffe if he means that where the provisions of the part extend to a colony, the colonial legislature cannot impose upon the owners of British ships any further statutory obligations in addition to the obligations imposed by the Imperial Act. It cannot impose any inconsistent obligations, but that is a very difficult proposition.

18. As to part V, Mr. Cunliffe thinks that certain provisions "on the whole, may be regarded as world-wide", or "appear to be general." In the absence of "express words or necessary intendment," I see no reason to doubt the powers of colonial legislatures to make different provision.

19. As to Part VI, I do not see how the power conferred upon colonial legislatures by section 478 can govern the application of the rest of the part to the colonies.

20. As to Part XI (lighthouses), Mr. Cunliffe argues—from the provisions enabling "colonial light dues", to be levied in certain cases—that "any colonial legislation which goes beyond the above-mentioned provisions of the Imperial Act would be *ultra vires*". This would appear to mean that a colony which erected a lighthouse would be entirely dependent upon the King in Council and the Board of Trade for the imposition, collection, and application of light dues. I can see nothing whatever in the Imperial Act to support a contention, which appears to me to involve an extraordinary inroad upon colonial powers of self-government.

21. As to Part XIV, section 713 is referred to as being apparently of general application. It provides that the Board of Trade shall superintend "all matters relating to merchant shipping and seamen". Mr. Cunliffe alludes in various passages to this section as supporting his views of the restricted power of colonial legislatures, and appears to think that it gives the Board of Trade authority in the Colonies apart from Imperial legislation, expressly extending to the colonies. With this view—if it really held—I am unable to agree.

22. Mr. Cunliffe thinks that section 721 (exempting from stamp duty certain instruments under the Act) is of general application. It appears to me that this section is merely an exemption from duties imposed by the Imperial Parliament and that there are no express words or necessary intendment which justify its being construed to fetter revenue laws passed by colonial legislatures.

23. With regard to the application of the several parts of the Imperial Act to the British dominions generally, it appears to me that the fact of some of the parts containing a general application clause raises a strong presumption against the general application of those parts in which no such application clause is found, and makes the necessity for "necessary intendment" specially strong to support a general application of any sections in those parts. No such necessary intendment can be gathered from the fact that some sections are expressly limited to the United Kingdom while others are not so limited. The Imperial Act of 1894 is a consolidation of laws ranging over a long period and drawn by many hands—both before and after the passing of the Colonial

Laws Validity Act of 1865; and though much has been done in the way of harmonizing them, the Act bears many traces of the different sources from which it was compiled. Inferences drawn from variations of language in different sections are therefore peculiarly untrustworthy. In considering whether a particular section—in a part which does not contain a general application clause—is a general application or not, the only safe course is to look for the "necessary intendment" in that section itself. If it cannot be found there, then, in my opinion, no amount of inference and no considerations of the desirability of uniformity should influence the determination of the purely legal question whether the section extends to the colonies, within the meaning of the Colonial Laws Validity Act, so as to invalidate enactments of a colonial legislature which are inconsistent with it.

R. R. GARRAN,
Secretary, Attorney General's Department

January 15, 1906.

No. 16

THE SECRETARY OF STATE TO THE GOVERNOR GENERAL OF AUSTRALIA.

DOWNING STREET, September 3, 1908.

MY LORD,—

I have the honour to transmit to Your Excellency, for the information of your ministers, copy of correspondence with the Governor of New Zealand on the subject of merchant shipping legislation.

2. I trust that your ministers will concur with me in thinking that legislation respecting vessels engaged in the intercolonial trade, which are not registered in the Commonwealth or in New Zealand and which do not engage in the coasting trade of either colony, should be determined upon by mutual agreement between the Commonwealth, New Zealand, and His Majesty's Government, and should be passed by the Imperial Parliament.

I have, &c.,

CREWE.

No. 17

THE SECRETARY OF STATE TO THE GOVERNOR GENERAL OF AUSTRALIA

DOWNING STREET, September 18, 1908.

MY LORD,—I have the honour to request your Excellency to inform your ministers that I have had under most careful consideration, in conjunction with the Board of Trade, Lord Northcote's despatch of the 17th of June,† on the subject of Commonwealth legislation in regard to navigation and shipping. The matter is one of the greatest complication and importance, and it has not been possible to return a reply to Lord Northcote's despatch at an earlier date.

2. His Majesty's Government appreciate the fullness and frankness with which your Prime Minister has expressed his views on the general question of the powers of the Commonwealth of Australia, with regard to shipping legislation, and they feel, no doubt, that your ministers will desire to have in reply as frank an explanation of the views which His Majesty's Government hold on the points on which they are at issue with your Government.

3. His Majesty's Government regret that they are unable to agree with your ministers as to the power of legislation in regard to navigation which has been conferred upon the Parliament of the Commonwealth of Australia by the Imperial Act of 1900. They had not hitherto been aware that Mr. R. R. Garran's memorandum, furnished to the Australian Royal Commission on the Navigation Bill, and printed as Appendix E, to the report of that body, had received the endorsement of the Government of the Commonwealth. Since, however, it appears from the 10th and 11th paragraphs of Mr. Deakin's despatch, that the memorandum has now been accepted by your Government as a correct statement of the legal position, I desire to inform your ministers, that, in preparation for the Imperial Shipping Conference of 1907, His Majesty's Government obtained an opinion from the then law officers of the Crown and another distinguished constitutional lawyer as to the power of legislation in matters of navigation conferred upon the Commonwealth Parliament. They are advised that the Parliament has only such powers of legislation so as to override the

† No. 3.

provisions of the Merchant Shipping Act, 1894, as are given by sections 735 and 736 of that Act, and that the effect of section 51 (1) and section 98 of the Constitution of the Commonwealth is merely to confer upon the Commonwealth Parliament a power of legislation on navigation matters paramount to that of the State Parliaments, but that these sections do not in any way extend the legislative power of the Commonwealth beyond the powers previously exercised by the State Legislatures. It is, of course, open to the Commonwealth Parliament—as to the Parliaments of the States—to re-enact any provisions of the Imperial Merchant Shipping Acts, but His Majesty's Government are advised that it is not open to the Commonwealth Parliament to enact any legislation which is repugnant to any provisions of the Imperial Shipping Act which extend to the whole of His Majesty's dominions. His Majesty's Government are also advised that the views expressed in Mr. Garran's memorandum as to the extent to which the provisions of the Merchant Shipping Act of 1894 apply to His Majesty's dominions, are not on the whole correct, and in this connection they would refer to the memorandum of the solicitor to the Board of Trade, printed at pages 56 *seq.* of (Cd. 2483).

4. It is, of course, impossible for any decision as to the actual powers of the Commonwealth Parliament to be arrived at except on appeal to a judicial tribunal and His Majesty's Government have no desire to lay stress on any technical argument derived from the interpretation of statutes; but they think well to explain in some detail why they consider that it is desirable that the legislation of the Commonwealth Parliament should be restricted to the re-enactment and adaptation to local circumstances of provisions already contained in the Imperial Merchant Shipping Act, and to independent legislation for vessels registered in the Commonwealth or engaged in the coasting trade of the Commonwealth. This was the principle contended for by the representatives of His Majesty's Government at the Navigation Conference of 1907, and it was hoped by His Majesty's Government that a final and satisfactory settlement had been reached by the adoption of resolution 9, which was passed unanimously by that Conference, and under which the vessels to which the conditions imposed by the law of Australia or New Zealand were applicable should be,—

(*a*) Vessels registered in the Colony, and
(*b*) Vessels wherever registered while trading on the coast of the Colony.

5. I regret to learn that the agreement which seemed to have been reached under this resolution does not now exist, but a reperusal of the whole discussion as contained in the report of the Conference appears to me to show beyond doubt that the majority of the delegates clearly understood—indeed stress was repeatedly laid on the fact that this resolution was the most important of all those discussed—that the purpose of the resolution was to define authoritatively the cases in which colonial legislatures should exercise powers of legislation with regard to merchant shipping matters.

6. I observe that Mr. Deakin infers from resolutions 2, 3, 4, 5, and 6, which indicate certain conditions that are to apply only to ships registered in Australia or engaged in the coasting trade, that certain parts of the law were to be applicable to all vessels within Australian territorial limits. This inference is, however, I think I may say, clearly mistaken, as will be seen from reference to the resolutions in question. Resolutions 2 and 3 refer to the scale of provisions and to inspection of provisions, and they deal with matters on which there is no Imperial legislation excluding legislation by colonial legislatures. Resolution 6 applies to all vessels including vessels engaged in the coasting trade and was carried in view of the desire of the representatives of the shipowners at the Conference to secure that, in the application of Australian conditions to vessels engaged in the coasting trade, due consideration should be shown for vessels which, built prior to the enactment of Commonwealth legislation, complied substantially, though not in detail, with the new regulations to be enacted by such legislation. Resolutions 4 and 5 are practically merely detailed statements of resolution 9, and it is significant that they were passed before resolution 9 was arrived at. Strictly speaking, after the passing of resolution 9, the two other resolutions might have been dispensed with, but it was considered desirable to retain them, as they had been passed, but were in no wise inconsistent with the subsequent resolution.

7. With reference to paragraph 18 of Mr. Deakin's despatch, I have to point out that, as already stated, there is no objection, either legally or in practice, to the adaption to local circumstances of provisions of the Imperial Merchant Shipping Acts and that, therefore, the conclusion drawn by Mr. Deakin in this paragraph is not accurate. With reference to paragraph 16 of that despatch it is perfectly true that parts of certain State Acts are *ultra vires*, but in most

cases the powers granted have not been exercised, and His Majesty's Government have never disallowed Acts purely because parts of minor importance are *ultra vires*.

8. But putting aside any question as to the interpretation of the resolution and Mr. Deakin recognizes that the natural interpretation is that accepted by His Majesty's Government, which was, no doubt, the interpretation present to the minds of the Representatives of His Majesty's Government, and it is understood also of the Representatives of the Government of New Zealand—it will be of advantage briefly to explain the position adopted by His Majesty's Government from the practical point of view.

9. It is entirely a matter for the Parliament of the Commonwealth to decide to what conditions vessels registered in Australia or engaged in the coasting trade shall be subject, and it is obviously of great advantage that the Australian Parliament should apply to local conditions the principles laid down in the Imperial Merchant Shipping Acts, as regards oversea ships which are engaged in trading to Australia, but which are not registered in the Commonwealth, and which do not engage in the Commonwealth coasting trade. For instance, so long as the principles of the Imperial Acts are reasonably maintained, there can be no question as to the desirability on general grounds of the Australian authorities controlling all ships, British and foreign, which trade to their ports in the matter of load line, assigning new free-boards where required, and detaining and punishing in cases of overloading. On the contrary, the more authorities there are in the Empire capable of exercising this jurisdiction properly, the more efficient will be the regulation of shipping.

10. But it is most important in the opinion of His Majesty's Government, that this regulation should be approximately uniform; otherwise a ship would be subject to different standards in going from one British port to another, and there would be no one British standard. It is not desirable that a British or foreign ship engaged in an oversea voyage, which has complied fully with all the requirements of the Imperial Act at one British port, should have to comply with some additional requirements on the same subject-matter at another British port, and it is important that there should be no doubt as to what the prevailing British standard at any moment is.

11. At the present time negotiations are in progress with a view to making the standards in all matters affecting the safety of ships international, so that they shall be in force equally among all the principal maritime nations. There is a prospect that in time an agreement may be reached on all the important points. But it will be obvious to your Ministers that His Majesty's Government's power of negotiation will be destroyed unless the self-governing dominions and the United Kingdom have the same standards for oversea shipping.

12. Moreover, your ministers will remember that if it is legitimate to Australia to make regulations with regard to oversea ships from the United Kingdom calling at Australian ports, it must be equally legitimate for the other self-governing dominions and for the Crown colonies, to make similar regulations, and that a hopeless confusion of authority would result, from the exercise by these dominions and colonies of such a power. For example, it would be open to the Governments of New Zealand and Fiji to require their own standard for Australian vessels trading to New Zealand or the Pacific, and, therefore, unless the gravest inconvenience is to be incurred, it is essential that oversea vessels should be regulated by a central legislature.

13. In exercising the powers of a central legislature, His Majesty's Government are always ready to meet, as far as possible, the views of any dominion as to the steps necessary for the regulation of navigation, but your ministers will recognize that the experience which an Imperial Government have in matters of shipping, is far greater than that possessed by any Australian Government could be, and His Majesty's Government trust that your ministers having regard to these considerations, will recognize the undesirability of pressing a demand for a compulsory and periodical Government survey of British and foreign cargo steamers, engaged in oversea journeys to ports in the Commonwealth. Your Government already have under the Imperial Shipping Act of 1894 full power to survey and detain any ship which there is any reason to believe is unseaworthy, and this power could be extended, if thought necessary, in order to secure safety of life. If Government surveys are necessary to secure seaworthiness in Australia they must be necessary in the United Kingdom, unless it is to be supposed that the overseas ships trading to Australia are exceptionally unsafe. If there were need for a radical alteration in the present system in order to secure safety, some evidence to this effect would have reached the Board of Trade, but the reports before the department show that the loss

of life is steadily diminishing, especially in steamers, and that the number of vessels detained for defects to hull and machinery has become very small. The present system, which places the full responsibility for maintaining the safety of the ship upon the owner, and which depends largely on the co-operation of the classification societies, is working on the whole successfully, it requires to be watched and checked and individual cases have to be dealt with by means of surveys, inquiry, detention or prosecution; but it is believed there is at present no case for the compulsory Government survey of all ships. If it were shown that a policy of this kind were necessary to secure safety, there could be no hesitation about adopting it by means of an amendment of the Imperial Act; but, in the absence of any such proof, it is hoped that upon reconsideration of all the circumstances, the Commonwealth Government will not press for its inclusion in the Navigation Bill so far as regards vessels neither registered in the Commonwealth nor engaged in the coasting trade. It would have effects reaching beyond Australia, and might be used by others as a precedent enabling them to require all ships to be surveyed not in order to provide for safety, but to secure patronage and the payment of fees.

14. I would also remind your ministers that, if the standards adopted in any dominion are considered unreasonable by foreign Governments they are almost certain to retaliate, not merely against the ships belonging to that dominion, but against all British vessels using their ports, and it would probably be impossible in practice to induce them to restrict this discrimination merely to vessels registered in the dominion in question. For example, in the case of the survey of steamers referred to in the last paragraph of my despatch, it would be quite possible for a foreign Government to require a different kind of equipment possibly of some patented kind, to that already provided, and British ships present wider front to this kind of attack than any others.

15. No doubt the shipping of Australia is still comparatively small, and the risks to which reference is made may, therefore, not seem likely to entail much loss upon the Commonwealth, but in this matter His Majesty's Government believe themselves to be entitled to ask your ministers to remember the great importance to the United Kingdom and to the Empire of the maintenance of the supremacy of the British mercantile marine, and not to take steps which, however little harm may directly be done to Australia, may cause serious loss to one of the most important of British industries. His Majesty's Government feel assured that your ministers are anxious in every way to assist in the development of the trade of the Empire, and that they will not willingly place obstacles in the way of that development.

16. In the light of this explanation of the principles on which the views of His Majesty's Government are based, your Prime Minister will, no doubt, see that he has misunderstood the effect of the passages in the enclosure to my predecessor's despatch of the 29th of November, 1907. His Majesty's Government would be most unwilling to delay the Royal Assent to an Act passed by the Commonwealth of Australia, and it was for this end that they convened the Imperial Shipping Conference of 1907, in order, as far as possible, to secure that the legislation adopted by the Parliament of the Commonwealth would be such as not unwittingly to injure Imperial interests of the highest concern.

17. The reference in Sir Walter Howell's Memorandum was simply a restatement of the position of His Majesty's Government which was adopted at the Imperial Shipping Conference, and which was then understood to be accepted by the representatives of the Commonwealth, that if the legislation passed were based on the resolution of the conference, His Majesty's Government would not hesitate to sanction the legislation, even though some of the clauses might contain provisions as to the expediency or strict legality of which they were doubtful. His Majesty's Government do not understand how there can have been deduced from this statement that there was any desire to interfere with the autonomy of the Parliament of the Commonwealth or to attempt to control Commonwealth legislation, except in cases in which to quote your Prime Minister's words, "Imperial and International relations are involved." In such cases your ministers will, no doubt, recognize that the control by the Imperial Government of the legislation of the Commonwealth is not a matter for decision by any court of law.

18. With regard to the Board of Trade note on clause 369 of the Navigation Bill, your ministers appear to have overlooked the fact that this clause purported to repeal, as regards Australia, a definite provision of the Mercantile Shipping Act of 1894, the application of which to Australia is beyond question, as the power there conferred upon the Board of Trade has been duly exercised at various times by the Board of Trade. Had a request been made by your

Government that the Board of Trade should abandon the power which is thus conferred upon them by the Imperial Shipping Act, it would have been a matter for the most careful consideration as to whether the power should or should not be retained. It will be seen from the memorandum by the Board of Trade commenting on certain points in the Navigation Bill, a copy of which I enclose, that the hypothetical case put by your Government is not one which could conceivably occur, and that the power at present given to the Board of Trade is a useful authority in cases where certificates have been cancelled by Marine Boards. In such cases your ministers will, no doubt, agree that the Board of Trade is as convenient and as impartial an authority as could possibly be found. But no such application was made by your ministers, nor was the matter discussed at the Merchant Shipping Conference, and as no reasons were given for the proposal, which His Majesty's Government are advised is certainly *ultra vires,* the Board of Trade could hardly be expected to reply to it further than by declining to concur in the proposals limiting their powers.

19. Despite the differences of opinion on the questions involved in this matter, His Majesty's Government observe with great pleasure that it has been found possible by your Government to give effect to most of the amendments suggested by the Board of Trade, and they trust that the explanations and arguments given in this despatch will enable your ministers to find it possible to adopt those amendments on which the Board of Trade still deem it necessary to lay stress.

I have, etc.,

CREWE.

No. 18

THE GOVERNOR OF NEW ZEALAND TO THE SECRETARY OF STATE

GOVERNMENT HOUSE, Wellington, June 22, 1908.

MY LORD,—I have the honour to acknowledge your predecessor's despatch of the 2nd April last, transmitting a copy of a letter from the Chamber of Shipping of the United Kingdom, communicating a resolution passed at the annual meeting of the Chamber.

2. My ministers are of opinion that it would not be advisable for the New Zealand Government to promise the Imperial authorities that it will not initiate legislation imposing restrictions upon British ships not registered in nor engaged in the coastal trade beyond those imposed by the Imperial Merchant Shipping Acts, as such a promise might hamper future legislation, especially as regards ships engaged in the inter-colonial trade.

I have, &c.,

PLUNKET,
Governor.

No. 19

THE SECRETARY OF STATE TO THE GOVERNOR OF NEW ZEALAND

DOWNING STREET, September 3, 1908.

MY LORD,—I have the honour to acknowledge the receipt of your despatch of the 22nd of June, on the subject of merchant shipping legislation.

2. I observe that your ministers are of opinion that it would not be advisable for the New Zealand Government to promise the Imperial authorities that it would not initiate legislation imposing restrictions upon British ships not registered in nor engaged in the coastal trade beyond those imposed by the Imperial Merchant Shipping Acts, as such a promise might hamper future legislation, especially as regards ships engaged in the intercolonial trade.

3. I presume, however, that your ministers do not desire to depart from the 9th resolution passed at the Merchant Shipping Conference of 1907, by which it was agreed that the vessels to which the conditions imposed by the law of Australia or New Zealand were applicable should be vessels registered in the colony while trading therein, and vessels wherever registered while trading on the coast of the colony. Sir Joseph Ward concurred in this resolution. It is clear that if the Parliament of New Zealand desires to impose restrictions on vessels engaged in intercolonial trade, the Parliament of the Commonwealth of Australia will have an equal right to impose such restrictions as may commend themselves to the Parliament on the same vessels, with the result of inevitable confusion of authority. I would therefore suggest that if it becomes necessary in the opinion of your Government to regulate further than is already done by Imperial legislation vessels engaged in intercolonial trade which are not registered in the Dominion and do not engage in its coasting trade, your Government should communicate their wishes to His Majesty's Government, in order that the matter may be fully discussed in conjunction with the Government of the Commonwealth of Australia, and, if necessary, further Imperial legislation be passed. Such a procedure would, I think, be in accordance with the views expressed by your Prime Minister at the Imperial Shipping Conference.

I have, &c.,

CREWE.

No 20

NEW ZEALAND SHIPPING AND SEAMEN'S ACT, 1903

The examination of the provisions of this Act has called for a great deal of critical work, which could not be adequately done during session-time, and I have consequently been compelled to devote some part of my holiday to it Before it was referred to me it had undergone the scrutiny of Messrs. Hill, Dickinson and Company, who made very valuable criticisms upon it, and it at first appeared to me that the shortest course that I could take in the interests of perspicuity would be to embody in one document my criticisms with theirs, and indicate where I agreed with or differed from them. On further con-

sideration, however, I came to the conclusion that it would be better to deal generally with the powers of colonies to legislate as regards merchant shipping, and then in the light of those observations point out where the New Zealand Act might be or ought to be amended.

In adopting this course I had in mind the possibility of avoiding much labour in the future, for if the Colonial Office concur in what is stated herein, this memorandum may form the basis of a further and perhaps more exact one, which could be forwarded to the various colonial authorities as embodying the views of His Majesty's Government, as to the scope of colonial ordinances dealing with merchant shipping.

It is essential, in dealing with colonial legislation on such a subject as this, to bear in mind that the Merchant Shipping Act, 1894, is an Imperial Act, and that as regards the matters with which it deals the general powers of a colonial legislature, so far as they are expressly given, are to be found in sections 735 and 736 of that Act.

From these two sections, and section 713, and subject to the remarks on special matters which I will note hereafter, it is clear from a general point of view the Imperial Act does not contemplate that a colony shall, as regards the matters dealt with by the Act, do more than legislate (by way of specific repeal with an implied or recognized power of new enactment) for ships registered in its possession, or regulate its own coasting trade.

As regards matters which are not dealt with by the Imperial Act (and there are cases for which the Act does not make provisions by reason of the fact that certain of its provisions only operate on British vessels when in course of specific voyages, etc.), it is a question whether it is not more the province of the Imperial Government than of a colony to legislate thereon for the complications which may arise if a colony is given a free hand to supplement the provisions of the Imperial Act by legislation affecting British ships other than those registered in its own possession or engaged in its coasting trade might be very great. In any case I opine that, supposing that a colony has power to legislate for such matters, such legislation would clearly be subject to the consent of His Majesty, and to due consideration of the rights of foreign states and our treaties with them and the interests of our other colonies, and the existing legislation therein.

The question as to how far a colony can legislate on such subjects is, of course, more for the consideration of the Colonial Office than for the Board of Trade, as the experience of the Colonial Office in such matters must be more varied than that of our department, but even assuming that such legislation is not beyond the powers of a colony, and is not "repugnant" within the meaning of the Colonial Laws Validity Act, 1865, still it is quite clear that such legislation can only be given effect to after careful consideration of all the interests involved.

It is, of course, not suggested that a colony cannot legislate for contracts entered into within her own jurisdiction, and consequently, it may come about that British shipping may, by such means, be brought under obligations having a like effect as direct statutory obligations, but such legislation would take a different form to that which is under consideration, and would be subject to comment as regards its effect upon Imperial interests.

It is also necessary to remember that certain provisions of the Imperial Act, e.g., the provisions as to emigrant ships, so far as they apply, cannot be altered by colonial legislation, because, as regards such of these matters as are dealt with in the Imperial Act the powers of a colony (subject to some special provisions in Part III, which are referred to later on), are restricted by section 735.

In addition, however, to the provisions of sections 713, 735 and 736, there are to be taken into account various sections in the Imperial Act which either specifically recognize the powers of existing colonial courts, or which confer powers on colonial courts, or officials to deal with specific matters, and it must be noted that the colonies are given special powers as regards the provisions of Parts II and VI of the Imperial Act (see sections 264 and 478).

For convenience I set out here the provisions of sections 713, 735 and 736.

713. The Board of Trade shall be the department to undertake the general superintendence of all matters relating to merchant shipping and seamen, and are authorized to carry into execution the provisions of this Act and of all Acts relating to merchant shipping and seamen for the time being in force, except where otherwise provided by those Acts, or except so far as those Acts relate to the revenue.

735. (1) The legislature of any British possession may by any Act or Ordinance, confirmed by Her Majesty in Council, repeal, wholly or in part, any provisions of this Act (other than those of the third part thereof which relate to emigrant ships) relating to ships registered in that possession, but any such Act or Ordinance shall not take effect until the approval of Her Majesty has been proclaimed in the possession, or until such time thereafter as may be fixed by the Act or Ordinance for the purpose.

(2) Where any Act or Ordinance of the legislature of a British possession has repealed in whole or in part as respects that possession any provision of the Acts repealed by this Act, that Act or Ordinance shall have the same effect in relation to the corresponding provisions of this Act as it had in relation to the provision repealed by this Act.

736. The legislature of a British possession may, by any Act or Ordinance, regulate the coasting trade of that British possession, subject in every case to the following conditions:—

(*a*) The Act or Ordinance shall contain a suspending clause providing that the Act or Ordinance shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

(*b*) The Art or Ordinance shall treat all British ships (including the ships of any other British possession) in exactly the same manner as ships of the British possession in which it is made.

(*c*) Where by treaty made before the passing of the Merchant Shipping (Colonial) Act, 1869, that is to say, before the thirteenth day of May, eighteen hundred and sixty-nine, Her Majesty has agreed to grant to any ships of any foreign State any rights or privileges in respect of the coasting trade of any British possession, those rights and privileges shall be enjoyed by those ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same, anything in the Act or ordinance to the contrary notwithstanding.

And now to deal in sequence with the different part of the Imperial Act.

With regard to Part I, this part (subject to the exemption from registry of certain small ships), is, by section 91, applied to the whole of His Majesty's dominions, and to all places where His Majesty has jurisdiction, and although technically a Colony has, under the provisions of section 735, power to repeal the provisions of Part I, as regards ships registered in that possession, it is unlikely that His Majesty would be advised to confirm any Ordinance which purported to repeal this part of the Act. Under this part of the Act, however, certain powers are conferred on colonial authorities or courts, e.g., section 4 (1) (E), sections 23, 28, 29, 30, 62, 73, 76 (subsection 4 of section 85 is an exempting one), 89 and 90, but these powers are for the more effectual carrying out of the provisions relating to the registry of British ships, and with the exception, perhaps, of section 59, the provisions of the whole of Part I, are of Imperial application.

With regard to Part II, dealing with Masters and Seamen. Sections 102, 124, 165, 172, 173, 188, 191 and 205 should be noted as indicating the powers of colonial courts, authorities or officials, section 261 specifies the provisions of that part which apply to colonial ships and to the owners, masters and crews thereof, and section 264 empowers the legislature of a British possession by law *to apply or adapt to any British ships registered at, trading with or being at any port in that possession and to the owners, masters and crews of those ships any provisions of Part II, which do not otherwise so apply.* This section confers wider powers on colonies as regards this particular subject-matter of merchant shipping than can be found in any other part of the Act. Not only can they legislate for British ships registered at, but also for such ships when trading with or being at any port in their possessions, and the owners, masters and crews of such ships, but the section is confined to the provisions of Part II. Whether again this last section impliedly limits the powers of a colonial legislature to exercising the powers conferred by the section, may be a matter of some doubt, but the fact that such a power is specifically and in such terms given by the Imperial Act, affords some ground for the view that it is a restricting rather than enabling power, for if the power had not been so given the general power of a colony to legislate on the lines of such provisions of the Imperial Act that do not otherwise apply would conceivably, at all events as regards ships registered in that possession, exist.

Section 265 should also be noted.

There may, of course, be a question as to the exact meaning which is to be given to the words "apply or adapt," in section 264, and I myself incline rather to the view that the word "adapt," must be read in conjunction with the provisions of section 713, and the many other provisions that make the Board of Trade the administrative department in merchant shipping matters.

As regards Part III, this must be subdivided into:—

1. Passenger steamers.
2. Emigrant ships.

As regards passenger steamers, it would appear that (subject to the provisions of section 284) in all cases where the provisions of the Imperial Act apply, and the colony wishes to alter such provisions, it is limited by the Imperial Act to its powers under section 735, and that as regards emigrant ships it has no powers outside the Imperial Act other than those specifically conferred upon it by the Imperial Act. See sections 270, 332 to 334 inclusive, 355 to 358 inclusive and 365 to 368 inclusive of the Imperial Act.

This being so it appears to me that as regards "passenger steamers" no colonial legislature should purport to impose upon the owners of British ships other than those registered in their own possession any statutory obligation or liability as to surveys, etc., where the owners of such ships have complied with the provisions of the Imperial Act or the duly sanctioned legislation of any other colony, and are possessed of valid certificates under such legislative authorities.

As to Part IV, though section 372 is very wide, I do not think that it was intended that the colonies should be concerned with this part of the Act—see section 372—and that if it be necessary for a colony to legislate for fishing vessels, such legislation being of a local character, would be held to be within their powers.

As to Part V, the provisions relating to the prevention of collisions, reports of accidents and life-saving appliances, general equipment and signals of distress are, speaking generally, of Imperial force, though the penalties in some cases for breach of the provisions apply only in the cases of vessels leaving ports in the United Kingdom. The provisions as to draught of water are of general application, and also, with specified exceptions, those as to load lines when British ships leave a port in the United Kingdom, and note sections 440 (5), 446 and 442 (1) (A).

Section 444 provides that where the Legislature of a British possession by any enactment legislates with regard to load lines for ships registered in that possession, and it appears to His Majesty that that enactment is based on the same principles as those contained in Part V, of the Imperial Act, His Majesty may by Order in Council declare that such load line, etc., shall, as regards ships so registered, have the same effect as it fixed, etc., in pursuance of Part V, of the Imperial Act.

As to the provisions as to dangerous goods in sections 446 to 450, it might be contended that they are applicable only in the United Kingdom by reason of the reference to the Explosives Act, 1875, but I think, on the whole, they may be regarded as world-wide. See also specially the provisions of section 450. And if there is any doubt, no objection would probably be raised to a colonial legislature, embodying in an Ordinance similar provisions.

The provisions of section 451, relating to loading of timber, are confined to ships arriving in the United Kingdom during the winter and early spring months; similar provisions if desired by many of the colonies would probably have relation to ships leaving the colony. *The provisions relating to the carriage of grain in section 452 appear to be general in their application, and, so far as they go, the same may be said of the provisions of sections 453 to 456 inclusive.

The provisions as to unseaworthy ships, sections 457-458, are general.

The provisions contained in sections 459 to 462 inclusive apply only in the United Kingdom, but I see nothing to prevent a colony embodying similar provisions in an Ordinance if it be thought desirable.

Section 463 appears to be *general,* and would apply in a British possession subject to some modifications in detail.

It seems clear that the powers conferred by section 735 would enable a colonial legislature by enactment to repeal the provisions of this part of the Act so far as they affect ships registered in that Possession, but in the absence

of special circumstances I doubt whether, in the interests of uniformity, His Majesty would be advised to sanction such legislation.

With regard to Part VI, the subject of shipping inquiries has been dealt with by my predecessor, Sir Walter Murton, in a memorandum, a print of which has, I understand, been forwarded by the Colonial Office to the various British possessions.

I should like, however, to make the following observations with regard to shipping inquiries in British possessions:—

As regards colonial legislation, section 478 of the Imperial Merchant Act, 1894, is the governing section.

Where colonial legislation has created courts or tribunals competent to hold inquiries, the powers of section 478 come into operation automatically (cf. the Merchant Shipping Colonial Inquiries Act, 1882), and though, as a general rule, it is undesirable to re-state verbatim in a colonial Ordinance the provisions of an Imperial Act when they apply, it may be admitted that whereas in this part of the Imperial Act courts in colonies holding inquiries are to have the same powers of cancelling or suspending certificates, and to exercise those powers in the same manner as the courts holding similar investigations or inquiries in the United Kingdom, it is permissible and desirable that the sections in the Imperial Act which lay down the powers and procedure should be repeated in the colonial Ordinance.

It should be noted that section 478, though applicable in some respects to the same matters as those mentioned in section 464, is more limited as regards the events upon the happening of which an inquiry can be held, casualties and misconduct and incompetency are restricted to fewer cases, and the events which constitute a shipping casualty, such as the abandonment, stranding, loss of, and damage to a vessel, coupled with loss of life by reason of a casualty, are the occurrences which practically constitute or define a shipping casualty. No such definition is to be found in section 478. That section simply refers to a shipwreck or casualty, and Colonial legislatures may therefore prefer to rely solely on the words "shipwreck or casualty", and to put their own reasonable construction thereon, or may desire to define a casualty by reference to the actual occurrences constituting a shipping casualty which are set out in section 464, so far as fall within the wording of section 478.

The provisions relating to Courts of Survey, sections 487 to 491, are limited to the United Kingdom, but I see nothing to prevent a colonial legislature adopting similar provisions.

The provisions of section 480 to 486 inclusive, which refer to Naval Courts, do not, of course, concern a colony.

Part VII.—Delivery of goods appears to be limited to the United Kingdom.

Part VIII.—Liability of Shipowners.—This part is, by section 509 (and see section 504), except where the context otherwise requires, extended to the whole of His Majesty's dominions. It would therefore seem to be unnecessary for any colonial legislature to deal with the subject matter dealt with in this part.

Part IX.—Wreck and Salvage.

Section 510 is general in its application.

Sections 511 to 557 are, in the main, limited to the United Kingdom (but see sections 523, 544, 545 and 554). Especial attention is directed to the provisions of section 523, by which it is provided that unclaimed wreck found in any part of His Majesty's dominions belongs to His Majesty, except in places where the right to unclaimed wreck has been granted out by the Crown.

If, therefore, a colony legislates on lines similar to those above mentioned, care should be taken to provide that the proceeds to unclaimed wreck found in a Colony should be paid to the Imperial Exchequer. The provisions of the Colonial Courts of Admiralty Act, 1890 which more especially deal with *droits,* have, however, to be kept in mind.

Sections 557 to 564 are general.

Sections 566 to 569 apply only to the United Kingdom, but could no doubt be adopted by colonial Ordinance.

Part X.—Pilotage.—By section 572 this part of the Act extends to the United Kingdom and Isle of Man only.

Part XI.—Lighthouses.

The provisions of this part of the Act are, in the main, applicable to the United Kingdom, and the only powers with regard to colonial lights are those

contained in sections 670 to 675 of the Act of 1894. It should be observed that section 673 has been repealed by the Merchant Shipping (Mercantile Marine Fund) Act, 1898.

Unless, therefore, the power exercisable by His Majesty has been vested in a colonial legislature, or the Government of a colony, it would appear that any colonial legislation which goes beyond the above mentioned provisions of the Imperial Act would be *ultra vires*.

Part XII.—Mercantile Marine Fund, does not concern the colonies.

Part XIII.—Legal Proceedings.

By section 712 this part of the Act, except where otherwise provided, applies to the whole of His Majesty's dominions. Section 711 should be noted.

Part XIV.—Supplemental.

Section 713 has already been referred to.

Section 720 provides that, subject to any special provisions of the Act, the Board of Trade may prepare and sanction forms for any book, instrument or paper required under the Act, other than those required under the first part, which are to be prescribed by the Commissioner of Customs with the consent of the Board of Trade.

Sections 721 and 722 appear to be general in their application.

Section 723 needs no comment.

Sections 724 to 726 inclusive can be put into force in a colony by virtue of the provisions of section 727, and although there is no such express power given as regards inspectors (sections 728 to 730 inclusive), it is conceivable that a colonial legislature may make similar provisions for the appointment, etc., of Inspectors for carrying out the provisions of Acts relating to merchant shipping in force in the Colony.

Sections 731 and 732 do not concern a colony.

The exercise of the powers conferred by section 733 must, I think, be confined to the Board of Trade as the central authority, except perhaps, as regards ships registered in a colony, and even as regards those ships it would probably be undersirable that a colony should seek to exercise its power under the provisions of section 735.

Section 734 needs no comment.

Sections 735 and 736 I have already dealt with.

Sections 737 and 741 inclusive need no comment.

Section 742 defines certain expressions made use of in this Act, and it would be desirable when a colony is legislating on matters relating to merchant shipping that provision should be made that in construing the Act or Ordinance, unless the context otherwise requires, the words and expressions used in that Act or Ordinance, should have the same meaning as those assigned to them by the Imperial Merchant Shipping Act, 1894.

In conclusion, I think as a general rule it is not desirable that a colonial ordinance should repeat verbatim the provisions of the Imperial Merchant Shipping Act, which have operation in the colony, for in the event of any of the provisions of the Imperial Act which apply in a colony being amended by the Imperial Parliament, questions may arise as to the effect of the Imperial amendment on the provision so repeated in the colonial ordinance.

I can conceive that a plea might be raised for such a verbatim repetition as that to which I have referred, on the ground that it is desirable to have in one colonial Act all the provisions relating to merchant shipping which have operation within the colony, and although I feel the force of such a plea, I think the object would be sufficiently met by including in a schedule to any Colonial Ordinance relating to merchant shipping, such of the provisions of the Imperial Act as have effect throughout the whole of His Majesty's dominions.

In conclusion I would point out that I am aware that some of the provisions of the Ordinance which would come under the foregoing criticisms have no doubt in the past been the subject of legislation in the Colony, and that it may be contended that the time has gone by for suggesting that such legislation is *ultra vires* but in connexion with this, I would call attention to the criticisms of the Board of Trade and my predecessor in 1898 on the New Zealand Act of 1897, and the reply from Lord Ranfurly on the 20th of December, 1898, to Mr. Chamberlain, in which he refers to the proposal to consolidate the New Zealand shipping laws, and states that when this was done the remarks of my predecessor on the matters then in question would receive careful consideration.

It may be also mentioned that Mr. Seddon's views were obtained upon my predecessor's memorandum.

The memorandum of the Attorney General, which was received after the Ordinance, indicates the matters which appear for the first time in the New Zealand shipping legislation, and so far as these at all events are concerned, differ from the provisions of the Imperial Act, acquiescence in the past cannot be relied upon.

It is unnecessary to emphasize the point that the last thing anyone would wish to do would be to interfere with our colonies in the way in which they legislate for their own special matters, but where we get into realms of Imperial interests different considerations must arise, and they are so important that careful criticism should not be regarded in any way as captious or hostile. Where Imperial interests are concerned, uniformity of law is by far the best guarantee for harmonious working, and considering that the colonies have, owing to recent events, been drawn closer to the Mother Country, and that voices are heard calling for the inter-regulation of their respective commercial interests, the present time can well be taken as an opportunity for urging that on such an important subject as the statutory obligations of our merchant shipping laws throughout the world those of the Mother Country and her Colonies shall, as far as possible, be brought into unison, and that the strain on the ropes which unite her and them shall not be greater at one end than the other.

In the light of the foregoing observations I propose now to deal in another memorandum with the provisions of the New Zealand Act, and to offer such detailed criticisms as occur to me. For convenience of reference I have indicated in that memorandum, and also in the margin of a print of the Act, against each clause thereof, the different sections of the Imperial Merchant Shipping Act, 1894, with which the clauses in the colonial Act more or less correspond. I say more or less, because, although in many cases the clauses of the colonial Act agree almost verbatim with the provisions of the Imperial Act, yet in certain instances there are additions, and in other instances there are omissions, and different authorities are in the Colonial Act substituted for those prescribed by the Imperial one.

I have also inserted in the memorandum the sections of the New Zealand Shipping Acts, which, so far as I have been able to find, correspond with those in the Ordinance.

I am afraid that, so far as New Zealand is concerned, the principles which govern colonial legislation, which I have endeavoured to bring out in my memorandum above have been in the past somewhat relaxed, e.g., section 2 of the Colony's Act, 1877, when the scope of the Act was, I think, allowed to extend further than is contemplated by the Imperial Act, and it may be difficult to go back upon past legislation, but the time has probably come to prevent further extensions in this direction, and it may be that notwithstanding that the Colony's Act technically go further than they should, they may in practice have not worked any great detriment to British shipping.

R. E. C.

October 14, 1904.